No. 736

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In The

Supreme Court of the United States

Laura Morris, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased and Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello, Heirs of Washington Pocatello and Minnie Pocatello, both deceased.

Plaintiffs and Appellants,

vs

Amasa L. Clark, Joseph E. Robinson, and Box Elder County, Utah,

Defendants and Respondents.

PETITION FOR APPEAL BY APPELLANTS FROM A DECISION OF THE SUPREME COURT OF THE STATE OF UTAH, TO THE SUPREME COURT OF THE UNITED STATES, and APPEAL ON THE MERITS OF ERROR, and APPEAL ON THE QUESTION OF JURISDICTION, and CERTIORARI TO REVIEW DECISION OF THE SUPREME COURT OF THE STATE OF UTAH

APPEALED FROM

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Laura Morris, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased and Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello, Heirs of Washington Pocatello and Minnie Pocatello, deceased.

Plaintiffs and Appellants,

vs

Amasa L. Clark, Joseph E. Robinson, and Box Elder County, Utah,

Defendants and Respondents.

No. 6248

APPELLANTS PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES FROM THE SUPREME COURT OF THE STATE OF UTAH.

PETITION OF APPELLANTS

To the Chief Justice of the Supreme Court of the State of Utah.

Your petitioners, Laura Morris, Special Administratrix of the estate of Washington Pocatello, and Minnie Pocatello, husband and wife, both deceased and Lucy Pocatello Johnson, Maud Pocatello Race-

horse, Josephine Pocatello and Ray Pocatello, heirs of Washington Pocatello and Minnie Pocatello, respectfully shows:

Your Petitioners are the appellants in the above entitled cause;

That this action was first filed in the District Court of the First Judicial District of the State of Utah, in and for the County of Box Elder by the above named heirs of Washington Pocatello and Minnie Pocatello as plaintiffs in their own name to quiet title in them to an undivided one-third interest in the E 1/2 of S. E. 1/4 of Section-12. T. 11 N. R 3 W. S. L. M., in Box Elder County, Utah and an accounting of the rents and profits of said undivided one-third interest, against U. F. Diteman, A. I. Grover and Hortense Grover, his wife and Amasa L. Clark, Joseph E. Robinson and Box Elder County, Utah. The only defendants that ever appeared, and pleaded in the said action, is the respondents, Amasa L. Clark and Joseph E. Robinson, who appeared and filed a demurred to the Original Complaint. One of the grounds for demurrer was that the heirs did not have capacity to sue for an accounting for the rents and profits, the complaint and the record showing that an Administrator had been appointed for the estate of Washington Pocatello, deceased, and that said estate was never settled and closed, and the administrator discharged. The Trial Court sustained the demurrer on that ground, and granted time to file an amended complaint. A second amended complaint was filed stating only one cause of action for quieting title and accounting of rents and profits.

Respondents Amasa L. Clark and Joseph E. Robinson again appeared and demurred to the complaint, one of the grounds of demurring being that two causes of action were improperly joined, one for quieting title, and one for accounting of the rents and profits. The Trial Court sustained respondents demurrer on that ground, then a third amended complaint was filed, stating two causes of action, one for quieting title in the heirs of Washington Pocatello, deceased, to the undivided one-third interest, in the E 1/2 of the S. E. 1/4 of Sec. 12, T. 11 N. R. 3 W. S. L. M., in Box Elder County, Utah, and a second cause of action for an accounting of the rents and profits, of said undivided one-third interest, commencing with the year 1925, the same being the first year that the respondents Amasa L. Clark and Joseph E. Robinson, claimed ownership to the said undivided one-third interest, of said 80 acres of land. Said Third Amended Complaint, pleaded verbatim the decrees of distribution, of the Judge of the said District Court made on the 7th day of November 1919, in the estate of Yaotes Owa, decreeing an undivided one-third interest in and to the E1/2 of S. E.1/4 of Sec. 12 T. 11 N.R. 3 W.S.L.M., to the estate of Washington Pocatello, deceased. Also the third amended complaint pleaded verbatim, another decree made on the same day by the same District Court Judge, in the estate of James Brown, and Jane Brown, decreeing on undivided one-third interest in the very same identical 80 acres of land, to the estate of Washington Pocatello, deceased; the said third amended complaint alleging that the plaintiffs, Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello and Ray Poca-

tello, were Indians residing on the Fort Hall Indian Reservation, in Idaho, wards of the Government, and that they were the only heirs at law of Washington Pocatello, and his wife Minnie Pocatello, both deceased, and that Washington Pocatello, was at all times mentioned in the complaint and at the time of his death,-which occured on the 27th day of April, 1917-, an Indian, and a ward of the United States Government. That said Third Amended Complaint also pleaded that on February the 2d, 1917, a short time prior to the death of Washington Pocatello, one Albert Saylor, believing that Washington Pocatello was the only heir entitled to inherit all of the said heretofore described 80 acres of land, secured a warranty deed from Washington Pocatello, and Minnie Pocatello, his wife, to one U F. Diteman for the entire 80 acres for the agreed price of $3200.00 payable $200.00 cash, and the balance of $3000.00 payable $300. each year on the 20th day of December, the last payment to be made on the 20th day of December, 1926, and that the said deed, was placed in escrow with the First National Bank of the City of Pocatello, Idaho; that the terms of the escrow agreement was plainly written on the envelope that contained the deed, and it was also alleged that the Cashier of the First National Bank, of Pocatello, Idaho, made and executed a sworn affidavit, setting forth the terms of the escrow, that said affidavit was dated, April 18th, 1917 and was filed of record in the County Records of Box Elder County, Utah, on the 19th day of April, 1917. The said complaint setting forth the affidavit verbatim. That said complaint alleged that said deed was secured from Washington Pocatello long before any interest in the

property had been decreed to Washington Pocatello; that said complaint alleged that U. F. Diteman and one A. I. Grover, almost immediately after the judge of the District Court of Box Elder County, Utah decreed the undivided one-third interest in the said 80 acres of land to the estate of Washington Pocatello, deceased, paid, or caused to be paid, into the First National Bank of Pocatello, Idaho, the escrow holder, only one thousand dollars of the agreed balance of $3000, set forth in the escrow agreement to be paid before the delivery of the deed could be made, and that the First National Bank of Pocatello, Idaho, the depositary, some 17 months after Washington Pocatello had died, wrongfully, unlawfully and illegally delivered the deed to U. F. Diteman or A. I. Grover, who did on the 10th day of November, 1919, illegally place the said deed executed by Washington Pocatello and Minnie Pocatello, of record in the County Records, of Box Elder County, Utah, and took possession of and claimed ownership of said undivided one-third interest in said described 80 acres of land. The property of the estate of Washington Pocatello, deceased. The said complaint alleging that the deed of Washington Pocatello and Minnie Pocatello was wrongfully delivered by the escrow holders, and wrongfully secured and filed of record by U. F. Diteman or A. I. Grover, and was void and of no effect, and passed no title to the said undivided one-third interest. The complaint further alleging that A. I. Grover and his wife Hortense Grover did on the 12th day of March, 1925, convey all of the said 80 acres of land to the defendants Amasa L. Clark, and Joseph E. Robinson, and that since March 12th, 1925, the said two defendants, exercised control and management, and claimed

ownership to the said undivided one-third interest; that it was alleged in said complaint that A. I. Grover had no title to said undivided one-third interest, and he passed no title to defendants to the undivided one-third interest; it was alleged in the complaint that the physical condition and value of the 80 acres of land had not changed in any material respect since the day of the decrees of distribution until the time of filing this suit.

The second cause of action was for an accounting of the rents and profits from said undivided one-third interest. We believe that is all the facts of the Third Amended Complaint that is necessary to set forth.

To this complaint the defendants and respondents again demurred, the court overruled their demurrer. The respondents answered, admitting that Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello and Ray Pocatello were the only heirs of law of Washington Pocatello and Minnie Pocatello, deceased; admitted they were Indians, wards of the Government, living on the Fort Hall Reservation in Idaho. By paragraph six of the answer respondents admitted all of paragraph six of the complaint thereby admitting that the District Court of Box Elder County, did on the 7th day of November, make and enter the two decrees of distribution, decreeing an undivided one-third interest in the estate of Washington Pocatello, deceased, and that true copies of said decrees were made a part o fthe complaint, marked Exhibits "C" and "D" respectively.

In paragraph eight of the answer, respondent admitted that the affidavit of the Cashier of the First National Bank of Pocatello, Idaho, the escrow holder, dated, April 18, 1917, describing the terms of the escrow was filed of record on April 19, 1917, and that a true copy of said instrument was set out correctly in paragraph 8 of the complaint.

Appellants alleged in paragraph 18 of the complaint that one Charles E. Foxley was appointed administrator of the estate of Washington Pocatello, deceased, and that the said administrator reported that he had received $995 from the Escrow Holder for the estate of Washington Pocatello, deceased, and respondents in paragraph 18 o ftheir answer admit that Charles E. Foxley, was appointed administrator of the estate of Washington Pocatello, deceased and that said probate proceedings were still pending and admitted that Charles E. Foxley reported certain cash from the sale of said premises as being an asset of the Estate of said Washington Pocatello, deceased. Respondents filed a separate defense to appellants complaint, and alleged among other matters that the defendants were owners in fee simple of the said premises, and among other matters alleged as a defense in paragraph 27 of their answer, at folio (0233) of the Abstract of Record, as follows:

> "That the First National Bank of Pocatello, Idaho, is insolvent, has been liquidated and that defendants can obtain no records from said Bank relating to the alleged escrow agreement; that if said First National Bank of Pocatello, Idaho, Escrow Holder, made an unauthorized delivery of

> said deed, then the Administrator of the said Washington Pocatello Estate and the Heirs of said Estate, by their subsequent acts, waived the performance of the conditions and ratified said delivery and by said subsequent acts raised a presumption of ratification of said delivery and are estopped to deny the validity of said delivery."

Appellants contended that was an admission by respondents that the Bank made an unlawful delivery of the deed, but the heirs of Washington Pocatello were estopped to deny the validity of the deed, by their action, and the action of the administrator placing the burden upon the defendants to prove the ratification by the Administrator, and the heirs of the estate of Washington Pocatello, deceased, or a valid delivery of the deed.

That respondents prayed for affirmative relief, that a Decree of the Court, be entered declaring respondents to be the owners seized in fee of said premises and that title thereto be quited in them to the undivided one-third interest, which also placed the burden upon the respondents to prove they had good title.

In all actions to quiet title, each litigant must prove his own title, and cannot rely on the weakness of the other litigant's title. It was also admitted by the respondents that the Deed of Washington Pocatello and Minnie Pocatello, was placed in Escrow not to be delivered until the full performance of the terms of the escrow was fulfilled. Therefore the burden was on the defendants to prove that the full purchase

price mentioned in said terms were paid to the Escrow Holder before he delivered the deed to the grantee or anyone for the grantee.

On these pleadings the case went to trial before the trial court of the First Judicial District of Utah, in and for Box Elder County. Certified copies of the Decrees of Distribution, distributing an undivided one-third interest in the 80 acres to the Estate of Washington Pocatello, deceased was admitted in evidence, and the District Court Record and File, in the Case of the Estate of Washington Pocatello, deceased, was admitted in evidence, which shows the Administrator filed no Inventory at all in the Estate of Washington Pocatello, deceased, but which file contains a Final Account and Petition, for Settlement, in the matter of the Estate of Washington Pocatello, deceased, showing that Charles E. Foxley, the Administrator of the Estate of Washington Pocatello, deceased, hereby renders and presents for settlement, his Account of the Administration of said estate for and including the period of time beginning from date of appointment- and ending on the 3rd day of March, A. D. 1921, as follows:

Cash Account

(a) Showing all Receipts, during the period of time above mentioned, of Moneys belonging to said Estate.

Month, January. Of whom Received. First Nat'l Bank of Pocatello, Idaho. On or for what. Land contract of sale by deceased and wife. $995.00.

Brief Description of Property was given as follows:

> "The property described in the petition for letters and described as an undivided one-third interest in the estate of Yaotes Owa, or one-third of the East 1/2 of the S. E. 1/4 of Section, 12, Tp. 11 N. R. 3 West, S. L. M., had been converted into cash by reason of a contract executed by Washington Pocatello and wife prior to the death of Washington Pocatello, and placed in escrow and covering such interest as might be determined as belonging to said Washington Pocatello."

The said Petition for Accounting, filed in the District Court of Box Elder County, in the Matter of the Estate of Washington Pocatello, deceased, by the Administrator of said Estate contains a prayer as follows:

> "Wherefore petitioner prays that this account be allowed and settled. Dated March 3, 1921."

At the same time the Administrator of the Estate of Washington Pocatello, deceased, in the Matter of said Estate, filed in the District Court of Box Elder County, a petition for distribution of the estate of Washington Pocatello, deceased, and petitioned said District Court for a hearing on said account and petition for distribution; that the District Court of Box Elder County never to this day has held any such hearing, the Judge of said Court set different dates for such hearing, the last date set for such hearing being the 13th day of February, 1922, no hearing was held on that date, and nothing

further was ever done by the District Court of Box Elder County, Utah, in the Matter of the Estate of Washington Pocatello, until this suit to Quiet Title, and for an accounting of rents and profits was filed.

The Probate File in the Matter of the Estate of Washington Pocatello, deceased, No. 355, and all the records and papers filed in said matter, is a part of, and pertains to the case at bar, and were all admitted in evidence, and they are so closely associated with and a part of this case, that the Court should take judicial notice of all that was done by the District Court in the Estate of Washington Pocatello, deceased. The Decrees of Distribution, in both the Estate of Yaotes Owa, and James Brown and Jane Brown, distributed the undivided one-third interest, to the Estate of Washington Pocatello, deceased, not to Washington Pocatello individually, and the District Court of Box Elder County, Utah, assumed jurisdiction over the estate of Washington Pocatello, deceased, and on the 12th day of January, 1920 issued letters of administration to one Charles E. Foxley, who duly qualified, and the record shows and it is admitted that administration of the Estate of Washington Pocatello, deceased, has not to this day been closed.

Subsequent to hearing and the taking of testimony in the case at bar by the Trial Court, and arguments by counsel and the submitting of Briefs the Trial Court, made its Memorandum Decision as follows:

Memorandum Decision.

Brigham, Utah

In Open Court October 23rd, 1939.

The Court: In the case of Laura Morris, Special Administratrix, vs Clark and Robinson, the Court directs that findings and decree be prepared in favor of the defendants and against the plaintiffs, for the reason that the court is not convinced from the record here but what the full amount of the escrow had been paid by Sailor or Diteman, or some of the parties in interest, and for the further reason that it affirmatively appears that during the minority of those Indians an administrator was acting, or supposed to be acting, in this jurisdiction, a fact which these Indians knew about for the reason that they went to the Superintendent at Fort Hall and requested certain things to be done; and it is my understanding that the statute of limitations will run against a minor during the time that the personal representative is acting. So far as the question of notice is concerned, the mere fact that Mr. Service made an affidavit showing terms of the escrow cannot be held to mean anything in view of the fact that the very deed referred to in the escrow appears to have been subsequently recorded showing a consideration of $3200. Nor does the affidavit of Grover, as shown in the abstract, give notice of any irregularity. So the findings may show that the defendants were, in effect, innocent purchasers for value.

Now, in view of the fact that I did not fix a date for rendering a decision in this matter, I will ask the reporter to make a transcript of this decision, and counsel for defendants is requested to prepare and present to this court not later than November 27th, 1939, after notice on counsel for plaintiff, proposed findings, conclusions of law and decree.

Counsel for defendants prepared and presented to the Court 30 Findings of Fact, which space and time will not permit to enter all of the same in this petition. And we will refer only to the first 13. (See trans. ff 0315 to 0319).

Finding I

That Laura Morris was legally appointed Special Administratrix of the Estate of Washington Pocatello, deceased. etc.

Finding II

That the plaintiffs Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello are the sole surviving heirs of Washington Pocatello and Minnie Pocatello, both deceased; that at all times mentioned herein they were and now are full blooded Indians, members of Western Soshono Tribe of Indians and at all times herein mentioned were, and now are wards of the United States Government, residing on the Fort Hall Indian Reservation in Idaho; that all said plaintiffs are over the age of twenty-one years and all of said plaintiffs joined in said action with

full knowledge and permission of the Superintendent of the Fort Hall Indian Agency of the United States Department of Interior, Office of Indian Affairs, of Fort Hall Indian Reservation, Fort Hall, Idaho.

Finding III

That Washington Pocatello, died on or about the 27th day of April, 1917, at Fort Hall, Idaho; that during his lifetime and at the time of his death he was the only heir by blood, of an Indian woman of the name of Yaotes Owa, and also of a daughter of Yaotes Owa, commonly called Jane; that Minnie Pocatello his wife died at Fort Hall, Idaho on or about the 28th day of May, 1928. etc.

Finding IV

That Yaotes Owa died in the late 80's that at the time of her death she was the owner of a certain tract of land, (describing it). That besides Washington Pocatello, Yaotes Owa left a daughter known as Jane who died in the late 90's without issue, but leaving as surviving her a husband named James Brown, and Washington Pocatello, a descendent by the half blood. etc.

Finding V

That no probate proceedings were held on either estate until 1917. etc.

Finding VI

That on the 7th day of November, 1919, that Justin D. Call made and entered two decrees determining heirship, and of distribution, one in the estate of Yaotes Owa, and one in the estate of Jane Brown and James Brown, in each decree of Distribution there was decreed an undivided two-thirds interest to James S. Brown, the son of James Brown, the husband of the widow woman Jane, the daughter of Yaotes Owa, and an undivided one-third interest to the estate of Washington Pocatello, deceased, each decree describing the same 80 acres of land located in Box Elder County, Utah described as follows, to-wit:

> The E 1/2 of the S. E. 1/4 of Section 12. Township 11, North, of Range 3 West, Salt Lake Meridian.

That a copy of the Decree in the estate of Yaotes Owa was filed for record by the Administrator on the 8th day of November, 1919, as recorded in Book H. Misc. Records at Page 319, of the records of Box Elder County, Utah, that a true and exact copy of said decree is attached to and made a part of plaintiffs complaint marked, exhibit "C"; that a copy of the Decree made and entered in the estate of Jane Brown and James Brown was by the administrator filed for record on the 8th day of November, 1919, and recorded in Book H. Misc. Records at Page 320 of the Records of Box Elder County, Utah, that a true and exact copy of this

Decree it attached to plaintiffs complaint marked Plaintiff's Exhibit "D", and made a part thereof.

Finding VII

That at the time said Decrees were made and entered, the said 80 acres of land were in fair state of cultivation but had no water right thereof, and the land was uneven and had an appraised value of $4900.00; that by said decrees of distribution James S. Brown claimed an undivided two-thirds interest in said land and the estate of Washington Pocatello, deceased, claimed to be the owner of an undivided one-third interest in said lands; that the said James S. Brown sold his undivided two-thirds interest in said premises to the predecesors in interest of one Albert I. Grover, and Washington Pocatello and Minnie Pocatello, in their lifetime made, executed and delivered in escrow a Warranty Deed for their undivided one third interest and that the said Albert I. Grover in November, 1919, by msene conveyances, became the owner of said premises and at said time entered into the possession of said property and thereafter until March, 1925, when the defendants herein became the possessors of said property, farmed said premises and collected all the rents and profits from said premises and paid no part of said rents or profits to the Administrator of the estate of Washington Pocatello and Minnie Pocatello, his wife, or to any of the heirs of said estate.

Finding VIII

That on or about February 2d, 1917, Washington Pocatello and Minnie Pocatello, his wife, entered into a contract to sell said eighty acres of land to one U. F. Diteman for a consideration of $3200.00 payable $300.00 cash, the balance of the purchase price to be paid in annual installments of $300.00 payable on the 20th day of December of each year until the full sum of $3200.00 was paid, the last installment falling due on the 20th day of December 1926; that said Washington Pocatello and Minnie Pocatello, his wife as sole heirs of Yaotes Owa, made, executed and delivered a Warranty Deed for said eighty acres of land to U. F. Diteman, which said Deed recited a consideration of $3200.00 and was deposited with the First National Bank of Pocatello, Idaho, as Escrow Depositary, the said Bank to hold said Warranty Deed until the consideration of $3200.00 was fully paid, at which time said Deed so left in escrow was to be delivered by said Bank to said U. F. Diteman; that the terms of said escrow agreement were written on the envelope containing the escrow papers; that an affidavit made at the time by the Cashier of said Bank was filed of Record in the County Recorders Office of Box Elder County, Utah, which said affidavit was in words and figures following:

Kind of Instrument: Affidavit. Date of Inst.: April 18, 1917. Recorded April 19, 1917, at 2:50 P. M. in F. of Misc., Page 613.

State of Idaho
County of Bannock. } ss.

W. D. Service, who being first duly sworn on oath says; That on the 1st day of January, 1917, he was, and ever since has been and now is the Cashier of the First National Bank of Pocatello, Idaho; that on the 2d day of February, 1917, Washington Pocatello and Minnie Pocatello, his wife, executed and placed in escrow with the First National Bank of Pocatello, Idaho, their deed conveying to U. F. Diteman of Seattle, Washington, the E 1/2 of the N E 1/4 of Section 12. T. 11. N. R. 3 W. SLM in Box Elder County Utah; that the said deed is now in the possession of the First National Bank of Pocatello, Idaho, and to be delivered to the said U. F. Diteman when all the following payments have been made at the said bank for and in behalf of the said Washington Pocatello, to-wit: $300.00 on December 20, 1917, and $300.00 on December 20, of each and every year thereafter up to and including December 20, 1926.

W. D. SERVICE,

Subscribed and sworn to before me this 18th day of April, 1917. Paul M. Bryan, Notary Public, Residence, Pocatello, Idaho. (Seal).

That said Escrow Agreement was entered into before Washington Pocatello had acquired any title to the premises through Probate Proceedings

and that said Washington Pocatello had never occupied said land.

Finding IX

That the plaintiffs offered no evidence at the trial of said cause to the effect that U .F. Diteman, Grantee in said Warranty Deed on escrow with the First National Bank of Pocatello, Idaho, himself or with one A. I. Grover, wrongfully, unlawfully, corruptedly and intentionally, with intent to defraud the Estate of Washington Pocatello and the heirs of the estate of Washington Pocatello, paid to the said Escrow Holder only $1000.00 on the purchase price of $3200.00 named in said Deed and Escrow Agreement and wrongfully and unlawfully procured from said depositary the said Warranty Deed; that said plaintiffs offered no testimony to the effect that said depositary did, unlawfully, wrongfully and contrary to the express terms and obligations of said Escrow Agreement, accept $1000.00 and deliver to said U. F. Diteman and A. I. Grover the said Deed; that the plaintiff's offered no testimony that at the time of the delivery of said Deed the said U. F. Diteman and said depositary Bank, all had knowledge that Washington Pocatello was dead for more than a year previous to the delivery of said Deed and that no administrator had been appointed for said estate and that by reason of the failure to offer evidence on said points heretofore set out in this paragraph, the Court finds against the same; the Court further finds that said Warranty Deed was by the First

National Bank of Pocatello, Idaho, delivered to U. F. Diteman, or some person acting for him, and the said deed which on its fact recited a consideration of $3200,00, was regular filed for record in the office of the County Recorder of Box Elder County, Utah, on November 10th, 1919 at 4:00 P. M. in Book 15 of Deeds at page 440; that said U. F. Diteman and A. I. Grover, or either of them, did not unlawfully, illegally or for the purpose of cheating or defrauding the Estate of Washington Pocatello and his heirs out of said property, file the said deed for record in said Box Elder County, Utah, but said deed was regularly filed of record and recorded; that the said A. I. Grover, by the recording of said Deed, did not attempt to take from the estate a valuable property right; that the said A. I. Grover did from November, 1919, claim ownership of said lands; that said Deed was not void but was a valid Deed and passed title to the undivided interest of said property to U. F. Diteman; that the depositary bank had no right to deliver the deed to said property without full compliance with the terms and obligations of the Escrow Agreement but the Court finds that the Deed was regular on its face, recited the consideration of $3200.00 and from the evidence in the case the Court finds that said $3200.00 recited in the Deed was paid to said Escrow Holder and that the transaction with said Bank was not fraudlent; the court further finds that although Washington Pocatello had no title before the property was decreed to his estate, that it was unnecessary to specifically enforce the Escrow Agreement under

the provisions of Section 7741 Revised Statutes of Utah, but the Bank upon payment of the consideration aforesaid, was justified in delivering said Deed to the grantee therein.

Finding X

That A .I. Grover on or about the 3d day of November, 1919, secured from U. F. Diteman and Josie Diteman, his wife, Quitclaim Deed for said eighty acres of land to himself which said Deed was recorded on or about the 11th day of November, 1919, in Book 15 of Deeds, at page 442, in the Recorder's Office of Box Elder County, Utah; that said A. I. Grover did not have knowledge that his grantors in said Quitclaim Deed had no legal title to the undivided one-third interest in said property; that said A. I. Grover did not unlawfully and wrongfully file said Deed for Record and did not admit that it was obtained without full compliance with the obligations of the Escrow agreement; that said A. I. Grover did cause his Affidavit to be filed on or about February 10th, 1920, and that a true and correct copy of said Affidavit is marked "Exhibit E" and attached to plaintiff's complaint and that as to said Affidavit the same was regularly made in connection with the making of a loan by said A. I. Grover from the State Land Board of Utah for $7500.00.

Finding XI

That the said A. I. Grover did not fraudlent obtain the said Washington Pocatello Deed and file

it for record; that after procuring the deeds for said premises in November, 1919, the said A. I. Grover took over said premises, farmed the same and thereafter collected all the rents and profits of said property; that said A. I. Grover did not account to the Estate of Washington Pocatello, or the plaintiffs herein, for rentals or otherwise, as the said A. I. Grover did not know that the Estate of Washington Pocatello, deceased, and the heirs of the estate claimed or owned an undivided one-third interest in the premises and that he was fraudlently cheating or attempting to cheat the heirs of said estate out of said interest; that from November, 1919, to March, 1925, during which period the Court finds A. I. Grover had control of the property, he was not an owner in common with the heirs of the estate of Washington Pocatello and did not collect the rents as a co-tenant with the heirs of the estate of Washington Pocatello and did not hold the same under a constructive trust for said heirs, but held and owned said premises in fee simple.

Finding XII

That on the 12th day of March, 1925, the said A. I. Grover, also known as Albert I. Grover, and Hortense Grover, his wife, conveyed by Warranty Deed all of their right, title and interest in and to the said eighty acres of land to the defendants, Amasa L. Clark and Joseph E. Robinson, and the said named defendants have since March 12th, 1925, exercised control and possession of all of

said premises and ever since said date have claimed and now claim ownership to the said undivided one-third interest in said property against the heirs of the Estate of Washington Pocatello, deceased and the administrator of said estate; the said defendants have, since the 12th day of March, 1925, collected all of the rents and profits of said land and have made no accounting for the same by reason of the fact that said defendants claim and own said premises; that said defendants and their immediate predecessor in interests, A. I. Grover, have at all times since November, 1919, been in the actual possession of said premises and the plaintiffs, or any of them, have not been seized or possessed of said property at any time since said last named date.

Finding XIII

That the defendants, Amasa L. Clark and Joseph E. Robinson were innocent purchasers for value, by Deed, from Albert I. Grover and Hortense Grover, his wife, dated on or about March 12th, 1925, that at the time said defendants purchased said premises they believed that A. I. Grover was the owner in fee of said premises and knew of no claim that A. I. Grover had fraudlently and wrongfully obtained the said Deed from said Bank as claimed by the plaintiffs herein and without the payment of the consideration recited in said Deed; that defendants did not know the Quitclaim Deed from U. F. Diteman and wife to A. I. Glover conveyed no title to said undivided one-third inter-

est; that said defendants had no knowledge or notice of any fraudulent acts of A. I. Grover and/or U. F. Diteman; that they did not connive and conspire in obtaining the said Deed and filing the same for record without paying any just consideration for the same that they did not know that the said undivided one-third interest had not been properly probated or legally transfered from the estate of Washington Pocatello, that defendants did not know that their grantor, A. I. Grover was at all times an owner only of an undivided two-thirds interest in said property and did not know that said Grover had the same in common with the heirs of the Estate of Washington Pocatello as to an undivided one-third interest; that these defendants did pay a consideration for said premises upon purchasing the same from A. I. Grover and wife, to-wit: the sum of $12,500.00 for the premises in their improved condition with water rights therefore; that the defendants by said mense conveyances obtained fee simple title to said premises and that the plaintiffs herein do not own an undivided one-third interest in said premises or any interests whatsoever; that the defendants since March 1925 have collected the rents and profits from said premises, but do not hold the same as co-tenants with the heirs of Washington Pocatello, under a constructive trust or otherwise, except as owners thereof.

There are 17 other findings some long and exhaustive Findings made by the Trial Court, however, Ap-

pellants believe the 13 findings hereinbefore quoted are sufficient to establish one of the Federal questions involved in this suit, that is the validity of a Statute of the United States hereinafter quoted.

Following the Findings of Fact the Trial Court made its conclusions of law. 1. That a Decree be entered dismissing Plaintiff's First cause of Action with predjudice; 2. That a Decree should be entered dismissing Plaintiff's Second cause of action as against the defendants herein. 3. That a decree should be entered that the defendants, Amasa L. Clark and Joseph E. Robinson, are the owners in fee simple title of the premises described in paragraph 23 of the Findings of Fact herein, and that decree be entered quieting title in said defendants thereto. 4. That said defendants are entitled to their cost of action. Let judgment be prepared accordingly. Dated 27th day of November, 1939, signed Lewis Jones, District Judge.

That a decree was made and entered by the Trial Court as follows:

> Now therefore, in conference with the said Findings of Fact and Conclusions of Law, it is by the Court hereby Adjudged
>
> 1. That plaintiff's or either of them, have no estate, right, or title, interest, claim or demand of any nature or description, or right of possession, in or to the real property, hereafter described, or any part thereof, and that the plaintiff's complaint as to the first cause of action be, and the same is

hereby dismissed with prejudice as against Amasa L. Clark and Joseph E. Robinson.

2. That the defendants Amasa L. Clark and Joseph E. Robinson are the owners in fee simple absolute and in the possession and entitled to the possession of the following described real property situated in Box Elder County, State of Utah, to-wit:

> The E 1/2 of the S E 1/4 of Section 12, Township 11 North, Range 3 West, Salt Lake Meridian.

3. That the plaintiffs herein, and each of them, and all persons claiming under them, or any of them, be perpetually restrained and rejoined from setting up or making any claim to or upon the real property herein above described, or any part thereof, and the title of the defendants herein, Amasa L. Clark and Joseph E. Robinson, to said property is hereby quieted against all claims, demands or pretentions of the plaintiffs herein, or any of them, and of all persons claiming under them, or either of them.

4. That the plaintiffs second cause of action be, and the same is hereby dismissed.

5. That defendants recover costs herein taxed the sum of $4.30.

And judgment is hereby entered accordingly.

Dated this 27th day of November, 1939.

Lewis Jones,
District Judge.

Filed November 27th, 1941.

The first Federal question involved in the case is the Construction of the United States Statute, enacted by the United States Congress on June the 30th, 1834; enacted for the protection of Indians, that in all trials for the right of property in which an Indian may be a party on one side, and a white person on the other, that the burden of proof is upon the white person, if the Indian only makes out a presumption of title, which United States Statute reads as follows:

> "In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof rests upon the white person whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."
>
> Act of Congress, June 30, 1934, Sec. 22 of Act; c. 161, Sec 22, 4 Stat. 733 R. S. Sec. 2126; U. S. Code, Compact Edition, Sec. 194. United States Code Annotated Vol 25, Sec 194.

The policy and purpose of this United States Statute was to protect the Indians in their right of property, and the said Statute has the same force and effect today as it had the day it was enacted.

"Policy evidence by the Statute:

This section is evidence of the policy of the government to give Indians the benefit of the doubt on questions of fact or construction of treaties or statutes relating to their welfare." (1925) 34 O. Atty. Gen. 139.

Appellants called the attention of the Trial Court to this United States Statute, in the argument of counsel, and in appellants brief to said court by copying the Statute verbatim, and giving the proper citations telling the Court where the true text of the Statute could be found.

In the case at bar, the Trial Court by its findings did not alone deny to these Indians the rights and privileges of the Federal Statutes, but in violation of said Statute, heaped burdens of proof on the Indians that is contrary to the universal weight of legal authority, to place upon a white person litigant in a suit of this kind.

In the case at bar, it was admitted by defendants and found by the Trial Court that Appellants were Indians, Wards of the Government, living on the Fort Hall Indian Reservation, in Idaho, that the District Court of Box Elder County, Utah, did make two Decrees of Distribution to the Estate of Washington Pocatello, of the undivided one-third of the 80 acres in question,-which created the highest muniment of title in the heirs of the Estate of Washington Pocatello, deceased, that is possible to hold; that the defendants admitted the deed of Washington Pocatello, and Minnie Pocatello, was placed in Escrow

not to be delivered until the full amount of $3000.00 was paid to the Escrow Holder; that Washington Pocatello died, some 17 months before the property was decreed to his estate, and before the Deed was delivered, and defendants, by their pleadings admitted that there was a question whether the Deed was rightfully delivered. Plaintiffs alleged in paragraph Nine, of their Complaint that only $1000.00 had been paid to the Bank, the Escrow Holder, and pleaded specifically in said paragraph that said Deed was wrongfully delivered, and wrongfully filed of record. Defendants in their Answer, answering Paragraph Nine, of the Complaint, in paragraph 9 of their answer, pleaded as follows:

> "As answer to paragraph 9 thereof, defendants have no knowledge or information sufficient to form a belief as to the truthfulness of said allegations, and for reason thereof deny all allegations of said paragraph 9 except admit and allege that the First National Bank of Pocatello, Idaho delivered said deed, which on its face recited a consideration of $3200.00, was regularly filed for record in the Office of the County Recorder of Box Elder County, Utah, and on November 10th, 1919 at 4 P. M., was recorded in Book 15 of Deeds at page 440."

That in no place in defendant's answer, or in defendant's further answer, by way of separate defense to plaintiff's first cause of action, did defendants allege or plead that the full $3200.00 had been paid, and the Washington Pocatello Deed rightfully delivered,

yet the Trial Court by its Findings attempts to make a good title for the white men, against these Indians, and thereby take from the Indian heirs of the Estate of Washington Pocatello, a valuable property right, and give it to the respondents. In violation of the Constitutional Right, of the Appellants that their property can not be taken from them, without just compensation, or under due process of law. As guaranteed to the Appellants by the Fourteenth Amerndent to the Constitution of the United States.

The Trial Court in Finding No. 10 found:

> "That said A. I. Grover did not have knowledge that his grantors had not legal title to the undivided one-third interest in said property."

And in the same finding found that:

> "that said A. I. Grover did cause his Affidavit to be filed on or about February 10th, 1929, and that a true and correct copy of said Affidavit is marked Exhibit "E" and attached to plaintiff's complaint and that as to said Affidavit the same was regularly made in connection with the making of a loan by said A. I. Grover from the State Land Boad of Utah for $7500."

By that Finding, also, the Trial Court, not only ignored and held for naught, the Statute of the United States, heretofore quoted but attempts to make a valid title for the defendants in the case. And in support of this contention, we quote a part of the Affidavit of A. I. Grover, that was filed of Record on February 10th, 1920, just two months after he wrongfully acquired the Washington Pocatello Deed and filed the same for record.

"That I was acquainted with Washington Pocatello in his lifetime and knew his family; that he was an Indian residing at Fort Hall, Idaho; that during his lifetime he and his wife made, executed and left in escrow a warranty deed in favor of U. F. Diteman, which deed was left to be delivered to the said U. F. Diteman upon the payment of the consideration mentioned in the said escrow agreement; that subsequently the said Washington Pocatello died and his heirs appeared as contestants in the probate proceedings referred to in entry No. 12 of the abstract; that in said hearing the estate of the said Washington Pocatello was given a one-third interest in said premises and thereafter the said U. F. Diteman paid to the bank the money sufficient to procure the said warranty deed so held in escrow and procured the said deed, and subsequently conveyed his interest to proponent as shown by entry No. 16 of the abstract and that thereafter an administrator was appointed for the estate of the said Washington Pocatello and the said administrator received and accepted the money paid by the said U. F. Diteman for the waranty deed in his favor from the said Washington Pocatello and his wife.

In further support of appellants contention that Trial Courts Findings attempts to make a title for respondents we quote part of its memorandum decision.

"So far as the question of notice is concerned, the mere fact that Mr. Service made an affidavit showing the terms of the escrow cannot be held to

> mean anything in view of the fact that the very deed referred to appears to have been subsequently recorded showing a consideration of $3200.00. Nor does the affidavit of Grover as shown in the abstract, give notice of any irregularity. So the findings may show that the defendants were, in effect, innocent purchasers for value.

If that is the law, then any deed placed of record whether stolen, or how obtained, once placed of record legally passes the title which is not the law. Also, the Affidavit of A. I. Grover was placed of record for a purpose, and the Trial Court found that was part of the Abstract of Title, and the above quoted part of the Affidavit was notice to the respondents of what it contained. Such holding by the Court, denied these Indians of the equal protection of the laws, of the State of Utah, in violation of the Fourteenth Amendment of the Constitution of the United States, for the reason that the Statute Law of the State of Utah, provides:

> "Section 78-3-2. Revised Statutes of Utah, 1933, Civil Laws of Utah, 1917, Section 4900; reads as follows:
>
> "Every conveyance, or instrument in writing affecting real estate, executed, acknowledged or proved, and certified in the manner prescribed by this title and every patent to lands within this state duly executed and verified according to law, and every judgment, order or decree of any court of record in this state, or a copy thereof, required by law to be recorded in the office of the county recorder shall, from the time of filing the same

with the recorder for record, impart notice to all persons of the contents thereof; and subsequent purchasers, mortgagees and lienholders shall be deemed to purchase and take with notice."

This Statute of the State of Utah has already been construed, by the Supreme Court of the United States, to the effect that any recorded instrument in the State of Utah is notice to the world of all it contains.

> Calhoune Couny vs American Emigrant Co., 93 U. S. page 127; 23 L. ed. 826.

The Trial Court, denied the Appellants, the equal protection of the laws of the State of Utah, in violation of the Fourteenth Amendment to the Constituion of the United States when it held in the closing part of its Finding No. 9 as follows:

> "the Court finds that although Washington Pocatello had no title before the property was decreed to his estate, that it was unnecessary to specifically enforce the Escrow Agreement under the provisions of Section 7741, Revised Statutes of Utah, but the Bank, upon payment of the consideration aforesaid, was justified in delivering said Deed to the grantee therein."

Section 7741, Civil Laws of the State of Utah, 1917, now Section 102-11 -26 Revised Statutes of the State of Utah, 933, were and are part of the Probate Code of the State of Utah, and in both Statute Books, read identically as follows:

"Specific Performances of Decedents Contracts:

"When a person who is bound by contract in writing to convey any real estate or who is bound by contract in writing to assign, transfer or deliver any personal property, shares of capital stock, bonds or other choses in action, dies before making the conveyance, assignment, transfer or delivery; and in all cases when such decedent, if living, might be compelled to make such conveyances, assignment, transfer or delivery, the court may make a decree authorizing and directing his executor or administrator to convey such real estate, or to assign, transfer or deliver such personal property, shares of capital stock, bonds or other choses in action, to the person entitled thereto."

That Statute of the State of Utah, was enacted purposely to protect the heirs of the estates against just such loss of valuable property rights as occurred in Escrow, for the reason that there is no conveyance by a deed placed in Escrow, until there is a valid delivery of the Deed and it is a well settled rule of law that there can be no valid delivery of a Deed placed in Escrow, until there is a full performance of the escrow contract and in case where the grantor has died, the heirs would have a right to contest the delivery of the deed, if they so choose, and the Court would decide. This Statute was pleaded by the Appellants, in paragraph 21 of their complaint, and was argued and briefed before the Trial Court. This point will be again alluded to in Appellants Assignment of Error of the Decision of the Supreme Court of Utah, in this case.

That in support of another Federal Question, the Appellants alleged in their Reply to the further and Separate Defense, pleaded by the Respondents as follows:

> "that defendants had full knowledge and notice that the heirs of Washington Pocatello were full blooded Indians living under tribal relations on the Fort Hall Indian Reservation in Idaho were wards of the Government and that Washington Pocatello and Minnie Pocatello did not have any right or authority to execute the deed in the first place, for the reason that no Certificate of Compentency had been issued by the United States Government to either Washington Pocatello or Minnie Pocatello before this deed was executed by them, that said conveyance was not submitted to or approved by the Secretary of the Interior of the United States as is provided for by Act of Congress of May 27, 1902, c. Sec. 7, 32 Statute at Large, 275, also the execution of said Deed by Washington Pocatello and Minnie Pocatello and the escrow agreement entered into by them was made and all acts done by them and the said U. F. Diteman was in violation of Sec. 3. Act of Congress dated March 3, 1871, 16 Statute at Large, 570, prohibiting contracts by or with Indians who are wards of the Government except under the conditions provided for in said Act, and with the approval of the Department of, and the Secretary of the Interior."

The first part of said Act of Congress recites:

> "No agreement shall be made by a person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands. etc."

This United States Statute, was not only pleaded by the Indians, the heirs of Washington Pocatello, deceased, but it was argued and briefed to the Trial Court, and the Trial Court by its Findings and Rulings and Decree, denied the validity of said Statute as applying to the Indians in this case.

That the sweeping Findings of the Trial Court, and its decree dismissing Appellants cause of action and quieting title to the undivided one-third interest in said acres of land, denied to those Indians the protection, that the Congress of the United States enacted for the protection of Indians, from being robed of their property rights such as was done in the case at Bar.

Appellants excepted to the Trial Court's Findings of Fact, Conclusions of Law and Decree, and filed such exception with the District Court in which said case was tried and decided, in words as follows:

> "Comes now the plaintiffs and each of them, by and through counsel, and excepts to, and files this their exception to all of the Findings of Fact,

Conclusions of Law and Decree made in favor of the defendants and against the plaintiffs, in the above entitled action, as prepared by Counsel for defendants under order of the court, on the following grounds:

"That not any one of the Findings, Conclusions and Decree made in favor of the defendants and against the plaintiffs are supported by the evidence, facts and law of the case.

"That all of the Findings, Conclusions, and Decree, made in favor of the defendants and against the plaintiffs, are contrary to the evidence and facts of the case, and contrary to and not supported by the law governing any of the questions of law involved in the case." (See trans. 0134).

Said Exceptions was filed the same day that the Decree was filed.

That Appellants filed Notice of Appeal from the said District Court of Box Elder County, to the Supreme Court of the State of Utah; that appellants failed to file a proper Bill of Exceptions within the time allowed for filing same that Appellants petitioned the District Court of Box Elder County, Utah, for reliefs under Section 104-14--4, Revised Statutes of Utah, 1933, supported by affidavits of Counsel for Appellants, The Respondents through their counsel, objected to the Court granting to Appellants relief, and a hearing was had on said petition before the District Court of Box Elder County, Utah, and the said court after hearing

the petition and motion for relief, made and filed its Findings of Fact and Conclusions of Law, the said Conclusions of law reading as follows:

"1. That plaintiffs are entitled to relief from their default in not serving a proper bill of exceptions within the time fixed by law.

Dated this 11 day of March A. D., 1940.

Lewis Jones, Judge.

The said Judge of the District Court then made and entered the following Order and Decree.

"ORDER AND DECREE

"From the foregoing Findings of Fact and Conclusions of Law, signed by the court, the court hereby

"ORDERS AND DECREES; That plaintiffs be and are hereby relieved from their default in not filing and serving a proper bill of exceptions before the time for filing had expired, and that permission is hereby granted to cousel for plaintiffs to forwith serve proposed Bill of Exceptions upon counsel for defendants, and have same settled by the Court.

"Dated this 11th day of March, A. D., 1940.

"Lewis Jones, District Judge."

Said proposed Bill of Exceptions was forthwith filed

on counsel for respondents and a written acknowledgement of service was made by counsel for respondents on the 11th day of March, 1940.

That on the 15th day of April, 1940, at the time set by the District Judge for the settlement of the Bill of Exceptions in this case, and after due hearing, on the same, the District Court settled the Bill of Exceptions, the following which is a true and correct copy of the Court's settlement:

> "The foregoing bill of exceptions contains all the testimonial evidence adduced on the trial of the testimonial evidence addiced on the trial of this cause, and correctly contains the various proceedings during the trial as well as subsequent thereto, the same being true and correct, it is accordingly settled and allowed as a bill of exceptions in this cause.
>
> "Dated Brigham City, Utah, April 15th A. D., 1940.
>
> "Lewis Jones, District Judge."
> (see trans. 0361)

That there was drawn into this case and trial, the question of the validity, application, and construction of a number of Statutes of the United States, as heretofore and hereafter set forth, and the said decision ignores said Statutes, and hereby denies all the rights and privileges enacted for the protection of the Indian Appellants in the case; That said decision, denies to the appellants, the Constitutional protection of the 14th Amendment of the Constitution of the United States,

by taking from them a valuable property right without any compensation, or due process of law, and denies them the Constitutional right of the equal protection of the laws of the State of Utah and of the United States.

That the appellants perfected their Appeal from said District Court of Box Elder County, Utah, to the Supreme Court of the State of Utah, and said appeal was properly lodged in said Supreme Court of the State of Utah, the same being the highest Court in said State of Utah. The following is a true copy of said notice of appeal:

NOTICE OF APPEAL TO THE SUPREME COURT.

To the defendants, Amasa L. Clark, and Joseph E. Robinson, defendants, and to Messers Stephen, Brayton and Lowe, attorneys and Counselors of record for the defendants, Amasa L. Clark and Joseph E. Robinson and to Box Elder County, Defendant and to Walter G. Man, County Attorney of Box Elder County, Utah.

You, and each of you, please take notice:

That the above named plaintiffs, Laura Morris, Special Administratrix of the Estate of Washington Pocatello, and Minnie Pocatello, both deceased, and Lucy Pocatello Johnson and Maud Pocatello Racehorse, and Josephine Pocatello, and Ray Pocatello, heirs of the Estate of Washington Pocatello and Minnie Pocatello, deceased, the above

> named plaintiffs, hereby appeal, and by this notice does appeal to the Supreme Court of the State of Utah, from all and every part of the judgment made and entered herein, and filed on the 27th day of November, in the above entitled cause, insofar as said judgment is in favor of the defendants Amasa L. Clark and Joseph E. Robinson.
>
> This appeal is taken on questions of both law and fact and from the whole and every part thereof. (transcript 0335).

That the protection extended to Indians by the provision of the Act of Congress, heretofore quoted namely:

> Act of Congress June 30, 1834; c161, Sec. 22, 4 Stat. at Large. 735; Revised Statute Sec, 2136, U. S. Code Compact Ed, Sec 194.

follows the case throughout all courts and is as binding upon the Justices of the Supreme Court of a State as it is binding on the Judge of the District Court, and the same burden is placed by said Statute upon the white person litigant, in the Supreme Court of a State to prove that he had good and valid title to the property that the Indian claims title to.

It was admitted by the respondents and found by the Court that the Appellants, Indians in this case possessed the highest muniment of title to the interest in dispute as it is possible for any person to hold. However, notwithstanding the burden that the United States Statute placed upon the respondent, and the

duty the Statute placed upon the Supreme Court of the State of Utah, to apply the Statute in this case, respondents did on or about the 25th day of June, 1940, file a motion in the Supreme Court of the State of Utah to strike from the files in the case Appellants Bill of Exceptions. The Supreme Court of the State of Utah entertained said motion, and Noticed said Motion for hearing before said Court on the 3d day of July 1940. Three Justices of said Court, did hear respondents motion, and arguments made by counsel for both parties, and took said Motion under advisement, and said Court did on the 17th day of July, 1940, make and enter an Order in the case at Bar, striking Appellants Bill of Exception, thereby relieving the Respondents from the burden placed upon the Respondents by the said Statute of the United States to prove in all Courts that the Respondents had a superior title to the property, and that the Washington Pocatello deed, was not only a valid deed when executed, but also that there was a valid delivery of the deed after his death. In this case there were no doubts to be considered as to the validity of the Title of the Appellant, before, and at the time the deed of their father was the same as stolen by Respondent's predecessor.

That subsequent to the Court striking the Bill of Exceptions, Respondents moved to dismiss the appeal, on the ground that the Bill of Exceptions having been striken there was nothing before the Court, that the Court could consider. This motion was argued to the Court and submitted, and the Court on the 4th day of October, 1940, denied the motion to dismiss the appeal,

and subsequently set the case for hearing on its merits, upon the Judgment Roll only.

Appellants brought to the attention of the Supreme Court of the State of Utah, in their brief before argument, and by oral argument the United States Statute enacted by Congress for the protection of Indians

in all trials for the right of property, where it is shown that the Indian had a presumption of title. In this case the Indian was not relying on a presumption, but had the highest muniment of title possible to exist. Appel lants brief to the Supreme Court of Utah set forth verbatim the Act of Congress passed on June the 30th, 1834, Citing where the Statute could be found, and argued this Statute to the Supreme Court on behalf of Appellants.

The Appellants also, brought to the attention of the Supreme Court of the State of Utah by written brief and argument the contention that Washington Pocatello and Minnie Pocatello, at the time they executed the deed were Wards of the Governmnt, and incompetent under the Statutes of the United States, and that no Certificate of Competency had been issued to them, removing the restriction of incompetency, and thereby their deed was void, and cited to the Supreme Court of Utah, the following Statutes of the United States, governing contracts made with Indians where no certificate of Compentcy had been issued to them; namely:

Act of Congress, March 3, 1871, c 120, Sec. 3,

16 Statute at Large, 570. U. S. Code Compact Edition, Sec. 81.

Act of Congress, May 27th, 1902, c.888, Sec. 7, 32 Statute at Large 275. U. S. Code Compact Edition, Sec. 379.

Act of Congress, March 1, 1907, c. 2285, 34 Statute at Large. 1018. U. S. Code, Compact Edition, Sec. 405.

That the said Supreme Court of the State of Utah, ignored, and refused to apply the protection of any one of the four quoted Acts of Congress, to the Appellant Indians in this case, thereby denying to appellants the rights and privileges of said Statutes, guaranting to the Appellants, and denying to Appellants the protection that the Congress of the United States enacted purposely to protect Indians, who are Wards of the Government, from having their valuable property rights taken from them in such manner as was done in the case at Bar.

That the Supreme Court of the State of Utah is the highest Court of said State in which a dicision in this suit can be had.

That in said cause there is drawn the validity and applicability of the Statutes of the United States heretofore quoted enacted by the United States for the protection of incompetent Indian wards of the Government.

That in said cause there is drawn the Constitution-

al Right guaranteed to the Appellants by the fourteenth Amendment of the Constitution of the United States; that their valuable property rights can not be wrongfully and unlawfully taken away from them and given to another without any remuneration whatsoever, and without due process of law.

There is drawn in this cause the Constitutional Right guaranteed to the Appellants by the Fourteenth Amendment of the Constitution of the United States the equal protection of the laws of the United States and the equal protection of the laws of the State of Utah, which was denied them.

That on the 18th day of April, 1941, the Supreme Court of Utah, which is the highest court in the State of Utah rendered and filed its decision affirming the decision of the lower court, which said decision takes from these Indian, the Appellants a valuable property without any remuneration or due process of law, and in violation of their Constitutional Right guaranteed the Appellants under the Fourteenth Amendment of the Constitution of the United States; which dicision denies to the Appellants, Indians, non-residents of the State of Utah, the Constitutional Right guarateed by the Fourteenth Amendment of the Constitution of the United States, the equal protection of the laws of the United States and the State of Utah, which decision is final.

In due time, and before the time had expired to file a petition, the Appellants petitioned the Supreme Court of the State of Utah for a rehearing of said case, pointing out to the Court the reasons why Ap-

pellants believed that the decision of the Court was wrong, and worked an injustice to the Appellants, that said Court took said petition under advisement, and on the 16th day of July, 1941 denied Appellants petition for rehearing, therefore Appellants have exhausted every chance to get justice in the Courts of the State of Utah, and have no recourse left except to appeal to the Supreme Court of the United States.

That therefore, in accordance with Sec. 237 (a) of the Judicial Code, now Sec. 344, 28 United States Code Annotated, and in accordance with the Rules of the Supreme Court of the United States your petitioners respectfully shows this Court that the case is one in which, under the legislation in force when the Act of January 31, 1928 was passed, to wit: under Section 237(a) of the Judicial Code, now Section 344, 28, United States Code Annotated, a review could be had in the Supreme Court of the United States on a writ of error as a matter of right.

The errors which your petitioners claim to be entitled to an appeal are more fully set out in the assignments of Errors, attached and filed herewith, persuant to rules 9 and 46 of the rules of the Supreme Court of the United States, and there is likewise attached and filed herewith a Statement as to the Jurisdiction of the Supreme Court of the United States as provided for by Rules 12 and 46 of the Rules of the Supreme Court of the United States; For convenience of the Court a true copy of the decision of the Supreme Court of the State of Utah, the Assignments of Error and the Statement as to the Jur-

isdiction of the Supreme Court of the United States are all printed and bound in one volume.

Wherefore, your petitioners prays for the allowance of an appeal from the said Supreme Court of the State of Utah, the highest court of said State in which a decision in this cause can be had, to the Supreme Court of the United States, in order that the decision and final judgment of the said Supreme Court of the State of Utah, may be examined and reversed, and also prays that a transcript of the record, proceedings and papers in this cause, duly authenticated by the Clerk of the Supreme Court of the State of Utah, and may be sent to the Supreme Court of the United Sstats, as provided by law, and an order be made touching the security to be required of the petitioner, and that the bond for cost tendered by the petitioner be approved.

Dated this 14th day of August, 1941.

ROY L. BLACK,
Attorney for Petitioners, admitted to practice before the Supreme Court of the United States.
Residence: Pocatello, Idaho.

P. C. O'MALLEY,
Attorney for Petitioners.
Residence: Pocatello, Idaho.

In The
Supreme Court of the United States

Laura Morris, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased and Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello, Heirs of Washington Pocatello and Minnie Pocatello, deceased.

Plaintiffs and Appellants,

vs

Amasa L. Clark, Joseph E. Robinson, and Box Elder County, Utah,

Defendants and Respondents.

APPELLANT ASSIGNMENT OF ERRORS

The petitioner assigns the following errors in the record and proceedings:

1. That the State Court erred in refusing to recognize the Statute of the United States, thereby denying appellants, right, and privilege under the United States Statute. Act of Congress, June 30, 1934, c161, Sec. 22, 4 Statute at Large, 763. Revised Statutes 2126, U. S. Code Compact Edition, Sec 194. U. S. C. A. Sec. 194, and to support Appellants contention that this Statute placed the burden on Respondents, to prove they had superior title, to the property in question than the Appellants. It being conceded and found

that the Appellants are Indians, Wards of the Government.

Appellants again quote the Statute in words as follows:

> In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

2. The state Court erred in refusing to support the Appellants contention, that it being admitted by Respondents, and found to be the fact by the Court, that Washington Pocatello. and Minnie Pocatello, both deceased, when they executed the deed in question, were Indians, wards of the Government, and therefore were incapacitated to make a valid deed, under the following Statutes of the United States; namely;

> Act of Congress, March 3d, 1871, c. 120, Sec. 3, 16 Statute at Large, 570. U. S. Code, Compact Ed. Sec. 81. 25 U. S. A. C. Sec. 81.

> Act of Congress, May 27th, 1902, c. 888, Sec. 7. 32 Statute at Large, 275. U. S. Code Compact Ed. 399. 25 U. S. A. C. Sec. 379.

> Act of Congress, March 1st, 1907, c. 2285, 34 Statute at Large. 1018. U. S. Code Compact Ed. Sec. 405. 25 U. S. A. C. Sec. 405.

And refusing to support the contention of Appellants, that the burden was on the Respondents, to prove that the Deed of Washington Pocatello, and Minnie Pocatello was a valid deed in the first place, and that there was a valid delivery of said deed. The above and foregoing Acts of Congress, having all been enacted for the protection of Indians, guaranteeing to Appellants, rights and privileges there under.

3. That the State Court, erred, when it struck the Appellants Bill of Exceptions, upon the motion of Respondents, and refused to examine the evidence submitted in the case. The refusal of the Supreme Court of the State of Utah to examine the evidence in the case to see whether the Respondents, white persons, had sustained the burden of proof, at the trial of the case, was denying to the Appellants the rights and privileges extended to Appellants by the Act of Congress, of June 30, 1934, s. 161, Sec. 22, 4 Statute at Large 763. Revised Statutes 2126. U. S. Code Compact Ed. 194., and was denying the Appellants a fair trial, and equal protection of the laws in violation of Appellants Constitutional Rights, under the Fourteenth Amendment of the Constitution of the United States.

The Supreme Court erred in striking the Bill of Exceptions for the further reason this is a suit of equity, and in all cases of equity when the appeal is on both questions of law and fact the Supreme Court shall pass on questions of both law and fact.

Section 104-41-1, Revised Statutes of Utah, 1933 reads as follows:

> "From all final judgments from the District Courts, except in certain cases specially provided for originating in City Courts and in Juctice Courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the Disrtict Court. In equity cases the appeal may be on questions of both law and fact; in cases at law the appeal shall be on questions of law alone. Appeal shall also lie from final orders and decrees of the final orders and decrees of the Court in the addministration of decedents' estate and in cases of guardianship."

In a recently decided case the Supreme Court of Utah held as follows:

> "This being an equity case we are required to examine the evidence and determine the facts for ourselves. It has some times been stated that the review of an equity case under our constitution and laws is a trial de novo upon the record" Jensen vs Howell, 75 Utah, 64, 282 Pac. P. 1034 - 1938. "In an equity case, this court is authorized to review both questions of law and fact." Independent Oil and Gas Co. v Shelton et al 79 Utah 384, 6 Pac 2d, 1027, 1032.
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> Federal Land Bank of Berkley v Salt Lake Valley Sand & Gravel Co. et al. 85 Pac 2d, P 791, (decided Jan. 3d, 1939.)

4. It being conceded, and the record and proceedings showing, and the Trial Court Findings No. 8 finding that the Deed of Washington Pocatello, and Minnie

Pocatello, deceased, was placed in escrow, the State Court erred in so emphatically throughout all of the proceedings of imposing the burden on the Appellants, that they had to show by positive evidence that the deed in question was not valid as found in Findings No. 9, of the District Court, Which Finding is upheld in its entirety by the Supreme Court of the State of Utah, such finding is contrary to law and is denying to the Appellants a fair trial and the equal protection the rights and privileges of the Laws of the United States and the State of Utah as guaranteed to Appellants by the Fourteenth Amendment of the Constitution of the United States.

5. The Supreme Court of the State of Utah, erred, in the seventh paragraph of its decision, because by said paragraph, coupled with all of the rest of its decision, the Supreme Court sustained and affirmed, and upheld in its entirety, all of the District Courts Finding No. 9, which said Finding No. 9 of the District Court, placed a burden upon the Appellants so contrary to the settled principles of law, that has existed for four hundred years of English and United States Jurisprudence, and so contrary to the facts set forth in the Judgment Roll that the upholding of such Findings, would be wrong were the Appellants white persons, let alone Indians, and thereby denied to Appellants the rights and privileges granted to the Appellants by laws of the United States. So as this Finding will be before the Supreme Court of the United States, we take the liberty to quote all of said finding verbatim:

"That the plaintiffs offered no evidence at the

trial of said cause to the effect that U. F. Diteman, Grantee in said Warranty Deed on escrow with the First National Bank of Pocatello, Idaho. Himself, or with the one A. I. Grover, wrongfully, unlawfully, corruptedly and intentional, with the intent to defraud the estate of Washington Pocatello and the heirs of the Estate of Washington Pocatello, paid to said eschow holder only $1000.00 on the purchase price of $3200.00 named in said Deed and Escrow Agreement and wrongfully and unlawfully procured from said depositary the said Warranty Deed; that said plaintiffs offered no testimony to the effect that said depositary bank did unlawfully, wrongfully and contrary to the express terms and obligations of said Escrow Agreement, accept $1000.00 and deliver to said U. F. Diteman and A. I. Grover the said Deed; that the plaintiffs offered no testimony at the time of the delivery of said Deed, the said U. F. Diteman and A. I. Grover and said depositary bank, all had knowledge that Washington Pocatello was dead for more than a year previous to the delivery of said Deed and that no administrator had been appointed for said estate and that by reason of the failure to offer evidence on said points heretofore set out in this paragraph, the court finds against the same; the Court further finds that said Warranty Deed was by the First National Bank of Pocatello, Idaho, delivered to U. F. Diteman, or some person acting for him, and that said Deed which on its face recited a consideration of $3200.00 was regularly filed for record in the office of the County Recorder of Box Elder County,

Utah, on November 10, 1919, at 4:00 P. M., in Book 15 of Deeds at Page 440; that the said U. F. Diteman and A. I. Grover, or either of them, did not unlawfully, illegally or for the purpose of cheating or defrauding the Estate of Washington Pocatello and his heirs out of said property, file the said Deed for record in said Box Elder County, Utah, but that said Deed was regularly filed for record and recorded; that said A. I. Grover, by the recording of said Deed, did not attempt to take from the estate a valuable property right; that the said A. I. Grover did November, 1919, claim ownership of said lands; that said Deed was not void but was a valid Deed and passed title to the undivided one-third interest of said property to U. F. Diteman; that the depositary bank had no right to deliver the Deed to said property without a full compliance with the terms and obligations of the Escrow Agreement but the Court finds that the deed was regular on its face recited the consideration of $3200.00 and from the evidence in the case the Court finds that said $3200.00 recited in the Deed was paid to said Escrow Holder and that the transaction with said Bank was not fraudulent; the court further finds that although Washington Pocatello had not title before the property was decreed to his estate, that it was unnecessary to specifically enforce the Escrow Agreement under the provisions of Section 7741, Revised Statutes of Utah, but the upon payment of the consideration aforesaid, was justified in delivering said Deed to the grantee, therein."

The Supreme Court of the State of Utah, picks from that long finding that placed the burdens on the Appellant, that the law does not in any incident, place on the plaintiff in a case suing to quiet title, under any condition, but especially where it is shown that the deed was placed in Escrow, and a valid delivery of the deed is in question, and especially in the case at Bar, where the Judgment Roll, and the Probate Proceedings in the Washington Pocatello estate shows that the valid delivery of the Deed was questionable. The Supreme Court commenting on Finding No. 9 of the Trial Court in paragraph Six of its decision says in part:

> "Upon these issues the Trial Court found in favor of the defendants and against the plaintiffs on the issue of payment **Vel non** (blackface ours) of the full consideration to the depositary before the delivery by it of the Deed, the court made the following finding:"
>
> > 'That the depositary bank had no right to deliver the Deed to said property without a full compliance with the terms and obligations of the Escrow Agreement but the Court finds that the Deed was regular on its face, recited the consideration of $3200.00 and from the evidence in the case the said $3200.00 was paid to said Escrow Holder and that was not fraudulent.' "

6. The Supreme Court of the State of Utah, erred, by only quoting and relying on the portion quoted by the Court of Finding No. 9, of the Trial Court, and

holds that there might be some evdience in the record that the Trial Court was alluding to when he used the words "from the evidence in the case," that might support the Finding of the Trial Court that the full sum of $3200.00 was paid to the Bank, and that the deed was validly delivered, and owing to the Bill of Exceptions having been stricken by the Court, the Supreme Court could not disturb the findings of the Trial Court, (see paragraphs 6 and 7 of decision). Appellants do not hesitate to contend this was error on the part of the Supreme Court, for the reason that Appellants believe that a reading of all of the Trial Courts Finding No. 9, that when the Trial Court used the words in Finding No. 9, "from the evidence in the case," the Trial Court was alluding to the fact that the Appellants did not prove to the satisfaction of the Trial Court, all the matters he enumerated and wrongfully charged that the Appellants failed to prove. When in fact and in law the Judgment Roll alone in the case, shows that the Appellants did offer all of the evidence sufficient to make out a complete case against the Respondents and put the burden on the Respondents to prove by positive evidence that their title was superior to the title of the Appellants, regardless of whether the Appellants were white persons or Indians. And Appellants have no hesitancy in contending that Finding No. 9, of the Trial Court unanimously sustained and affirmed by the Supreme Court, shows that the Courts of Utah, denied to Appellants the right and privilege granted to the Appellants under the United States Statute cited and the equal protection of the laws as guaranteed to appellants by the Fourteenth Amendment of the Constitution of the United States.

7. The Supreme Court of the State of Utah, erred, in the 7th paragraph of its Decision wherein it held:

> "Despite the striking of their bill of exception, appellants argue that such findings is not supported by the evidence. They contend that the admissions in defendants pleadings that Foxley, Administrator, had reported in the estate proceedings the receipt of only approximately $1,000.00 from the depositary bank and that the affidavit of the cashier of such bank herein before adverted to, setting forth the terms of the escrow was placed of record, plus the record of the Probate Proceedings in the Estate of Washington Pocatello — of which though contained in the Bill of Exceptions they contend we must never-the-less take judicial notice — it is conclusively shown that the escrow deed was delivered without performance of the condition. With this contention we don't agree. The report was never heard or passed on by the Probate Court. We can not say it necessarily spoke the truth with respect to the amount received by the administrator from the bank, nor that the report establishes that the bank delivered to him the total amount paid by the grantee in the deed, especially since the striken bill may contain evidence which precludes any inference what ever which might possible be drawn therefrom."

By this finding the Supreme Court of the State of Utah, not only refuses to take judicial notice of the probate proceedings in the District Court in this case which is a part of the case, but the Supreme Court says

that the report of the administrator to the District Court of Box Elder County, Utah, in the estate of Washington Pocatello, deceased,—which estate is involved in this suit,— "could not be said to necessarily tell the truth, as the report of the administrator was never passed on by the probate court." The Estate of Washington Pocatello, deceased, has stood unattended to in the District Court of Box Elder County for over 20 years, and then the Supreme Court of the State of Utah says the report of the Administrator, can't be considered, because it might not speak the truth with respect to the amount received by the administrator from the bank, nor that the bank delivered to him the total amount paid by the grantee in the deed. The report of the Administrator to the District Court of Box Elder County, Utah, is certainly strong prima facie evidence of what they contain, and is sufficient in this case to support the contention of Appellants that only $1000.00 was paid the Escrow Holder for the deed and to put the burden on the respondents to prove a valid delivery of the Deed, if the Appellants were white persons, let alone Indians, such finding by the Supreme Court is denying the Appellants equal protection of the laws, of the United States and the State of Utah.

8. The Supreme Court of the State of Utah erred in the 8th paragraph of its Decision, wherein it held against the contention of Appellants that Washington Pocatello having been dead some 17 months before the Deed was delivered that there could not be a valid delivery even if the full consideration was paid. The State of Utah has a Statute in its Probate Code Pertaining to Specific Performances of Decedents Contracts, which

was Section 7741, of Revised Statutes of Utah, which was in force at the time this deed was obtained and filed for record, and is now Section 102-11-26, which Statute is quoted verbatim in Appellants Petition for Appeal at page 14 of said petition. Furthermore the Court erred in applying the rule quoted by the Court from page 878 of 21 C. J. as found in paragraph 8 of the decision for the reason that rule is applicable only when it is shown there was a full compliance with all of the escrow obligations and in furtherance of Justice, and the rule laid down in C. J. does not over-ride the Statutes of the State of Utah, nor, does it permit the Court to simply presume there was full performance of the contract.

9. The Supreme Court of the State of Utah, erred, in paragraph 9 of its decision, wherein it held against the contention of Appellants, that the District Court decree in the Estate of Yaotes Owa, created in the heirs of Washington Pocatello, the highest muniment of title there exists, and that the same can only be taken from them by their own act, on a judgment of a court having proper jurisdiction. The Court holding that the deed being in escrow, that when it was delivered the doctrine of relation back, cut the heirs out. This holding by the Court is error, in the first place relation back of a deed from the time of delivery to the time of execution is not a doctrine in law, it is only a fiction in law, and applied only when it is shown and proven that there is a full performance of all obligations, and it is in the furtherance of Justice, that the fiction of relation back is invoked, and when Courts do invoke it, especially when it deprives heirs of their inheritance,

it is only done when the party seeking the relation back proves to the Court that every obligation on the part of the grantee to perform was fully performed and no injustice is done by invoking the fiction. The fiction of relation back can not be idly applied by the Courts to take property away from one person, a non-resident of the state and give it to another, a resident of the courts state.

10. The Supreme Court of the State of Utah further erred in the said paragraph 9 of its decision wherein it said:

> "Should Washington Pocatello have lived until the date of the decree of distribution of the Estate of Yaotes Owa, and the court have then decreed to him the undivided one-third interest, the conditions of the escrow agreement having in the meantime been fully complied with by the grantee in the escrow deed and the deed delivered, the decree of the Court would merely confirm the title warranted by the deed. The same result is effected by deliver upon performance of the conditions after the grantors death."

Such holding is error, for many reasons, first the Court just presumed contrary to the record in this case that there was a performance of the conditions of the Escrow. After a person dies, who has authority to say whether the conditions are fully performed or not? can the grantee and the Escrow Holder decide between themselves? have not the heirs the right to object if they believe te Escrow contract was not just?

Such holding, is so contrary to the Law of the State of Utah, that it is denying the Appellants in this case equal protection of the law of Utah. Section 101,-4-2, of the Revised Laws of the State of Utah, 1933, which said law was Section 6405, Civil laws of Utah, 1917, and was in force when Washington Pocatello died, and when this deed was delivered reads as follows:

> "Property of Interstate Passes to Heirs Subject to Probate Proceedings.
>
> "The property, both real and personal, of one who died without disposing of it by will passes to the heirs of the intestate, subject to the control of the court, and to the possession of any administrator appointed by the Court for the purpose of administration."

11. The Supreme Court of the State of Utah, erred, in the 11th paragraph of its decision, as such holding is contrary to and ignoring the Statutes of the United States heretofore cited on page..... of Appellants Petition for Appeal and set forth in Appellants Statement of Jurisdiction, wherein it held in said paragraph:

> "As far as revealed by the judgment roll any other conditions prescribed by law requisite to a valid contract by such Indians may have been—if at all applicable—complied with."

Under the Act of Congress, June 30, 1934, c 161, Sec. 22, 4 Statute at Large 763, R. S. Sec. 2126, heretofore cited and printed vertabim on page 27 of Appellants

Petition for Appeal. It was the duty of the Supreme Court to examine all the evidence in the case before it made such ruling, and such ruling as made by the Supreme Court denied Appellants their rights and privileges guaranteed by said United States Statute.

12. The Supreme Court erred, in the last paragraph of its decision, where the Court said:

> "In view of our holding that we may not on the record before us disturb the finding of the Trial Court that there was a full compliance with the conditions of the escrow before delivery of the deed to the grantee therein."

The Supreme Court of the State of Utah should have disturbed the findings of the Trial Court, and reversed the decision of the Trial Court.

13. The Supreme Court of Utah, erred, in affirming the judgment of the District Court.

That by such affirmation the Supreme Court, took from the Appellants a valuable property right and gave it to white persons, and denied Appellants the equal protection of the Laws of the United States and of the State of Utah, thereby depriving Appellants of their Constitutional Rights under the Fourteenth Amendment of the Constitution of the United States, and of their rights and privileges under the United States Statute.

Wherefore, on account of the errors hereinbefore assigned, petitioners pray that the said judgment of the Supreme Court of the State of Utah, dated and filed

on the 18th day of April, 1941, in the above entitled cause, be reversed, and judgment entered in favor of the Appellants.

Dated this 14th day of August, 1941.

ROY L. BLACK,
Attorney for Petitioners, admitted to practice before the Supreme Court of the United States.
Residence: Pocatello, Idaho.

P. C. O'MALLEY,
Attorney for Petitioners,
Residence: Pocatello, Idaho.

In The

Supreme Court of the United States

Laura Morris, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased and Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello, Heirs of Washington Pocatello and Minnie Pocatello, deceased.

Plaintiffs and Appellants,

vs

Amasa L. Clark, Joseph E. Robinson, and Box Elder County, Utah,

Defendants and Respondents.

STATEMENT OF JURISDICTION

The Appellants submit to the Court their statement of Jurisdiction and first give a brief history of the facts previous to filing this case, on which this suit was predicated, as follows:

Appellants are Indians, Wards of the United States Government, living on the Fort Hall Indian Reservation, in Idaho, under the supervision of the Department of the Interior, office of Indian Affairs and are sole heirs at law of Washington Pocatello and Minnie Pocatello. Deceased Washington died on or about the 27th day of April, 1917, at Fort Hall, and Minnie Po-

catello his wife died on the 28th day of May, 1928, at Fort Hall, Idaho. That neither Washington Pocatello or Minnie Pocatello had received a certificate of Competency from the United States Government at any time during their lifetime and was at all times mentioned in this suit, wards of the United States Government living under Indian tribal relations on the Fort Hall Indian Reservation. That an Indian Woman of the name of Yaotes Owa received a patent dated May 31st, 1884, from the United States Government for the 80 acres of land involved in this suit, located in Box Elder County, Utah. That Yaotes Owa died in the late 80's no probate proceedings were taken to determine heirship and right of distribution of the Estate of Yaotes Owa until February 1917. That in February 1917 one, Albert Sailor, believing that Washington Pocatello, was the only surviving heir of Yaotes Owa, located Washington Pocatello on the Fort Hall Indian Reservation, and on the 2d day of February secured from Washington Pocatello and Minnie Pocatello, his wife, a warranty deed to the full 80 acres involved in this suit, to one U. F. Diteman, a white person, for a consideration of $3200.00. $200.00 cash and the balance to be paid $300.00 a year on the 20th day of December each year until the full sum of $3000.00 would be paid. The last payment to be made on December 20, 1926. Said deed was placed in Escrow in the First National Bank of Pocatello, Idaho, not to be delivered until the full $3000.00 was paid to said Bank for the use and benefit of said Washington Pocatello. Probate proceedings were later commenced in the District Court of Box Elder County, Utah, to determine the heirship to, and distribution of the estate of Yaotes Owa. The

terms of the escrow agreement was written on the back of the envelope that the deed was placed in. On the 18th day of April, 1917, the Cashier of the First National Bank of Pocatello, Idaho, executed a certificate describing the terms of the escrow, and said certificate was filed of record in the County Record of Box Elder County, Utah, on the 19th day of April, 1917. This Affidavit was pleaded in plaintiff complaint verbatim and its making and filing of record was admitted by respondents and the full text of said affidavit is copied by the District Court into its finding No. 7. (Transcript 0317).

Washington Pocatello died on the 27th day of April 1917.

On the 7th day of November, 1919, the District Judge of the District Court of Box Elder County, Utah, made and entered two decrees of distribution of the same identical 80 acres of land, one in the estate of Yaotes Owa, deceased and one in the estate of Janes and Jane Brown, deceased, decreeing an undivided two-thirds in the said 80 acres of land to an Indian of the name of James S. Brown, and the other undivided one-third interest in the said 80 acres of land to the estate of Washington Pocatello, deceased, both decrees were filed of record in Box Elder County, Utah, on the 8th day of November, 1919. It is admitted by respondents and found by the court that U. F. Diteman or A. I. Grover secured the deed of Washington Pocatello from the First National Bank of Pocatello, Idaho, the Escrow Holder and filed the same of record in Box Elder County, Utah, on the 10th day of November, 1919, at

4:00 P. M. two days after the decrees were entered. This fact is admitted by the respondents and found to be a fact in the district courts Finding No. 9 a true copy of said Finding No. 9 is copied into Appellants assignments of error, and herein after set out in full in this statement. The said A. I. Grover took possession of, and claimed ownership to the said undivided one-third interest decreed to the estate of Washington Pocatello, deceased, by virtue of the deed secured from the escrow holder, and exercised control over the said undivided one-third interest, and received all the rents and profits, took them to himself until in March, 1925, when A. I. Grover and his wife conveyed the entire 80 acres to the respondents in this suit.

On December 3, 1919, one Charles E. Foxley petitioned the District Court of Box Elder County, Utah, to be appointed administrator of the estate of Washington Pocatello, deceased, and the said District Court did on the 12th day of January, 1920 appoint the said Charles E. Foxley administrator of the estate of Washington Pocatello, deceased, and said Charles E. Foxley qualified as Administrator of the estate of Washington Pocatello, deceased, all of which facts are to be found set forth as true in Finding No. 9 of the District Court in this suit, a copy of said Findings is set forth in Appellants specification of errors and also herein after set forth in full. Soon after his appointment the said administrator sent a certified copy of his letter of administration to the First National Bank of Pocatello, Idaho, and the said bank delivered to the said administrator the money paid to the bank by the said U. F. Diteman or A. I. Grover amounting to the

sum of $995.00, and the said administrator without filing any inventory or appraisement of any property in the estate of Washington Pocatello, deceased, did on the 3rd day of March, 1921, filed in the District Court of the First Judicial District of the State of Utah for and in the County of Box Elder, in the matter of the estate of Washington Pocatello, deceased, a final account, and petition for settlement, thereof, reporting to said District Court that he had received from the First National Bank of Pocatello, Idaho, $995.00, which had been paid into said bank upon land contract for sale of the E 1/2 of the S. E. 1/4 of Section 12, T. 11. N. R. 3 west S. L. M., that had been executed by Washington Pocatello and wife prior to the death of Washington Pocatello, and placed in escrow, and that $504.00 of this amount was due to him as attorney fees.

The said Administrator, Charles E. Foxley, at the same time that he filed his account as Administrator of the estate of Washington Pocatello, deceased, with the District Court of Box Elder County, Utah,on March 3, 1921, he filed his petition for distribution of the estate of Washington Pocatello, deceased, naming the Appellants, herein, as the rightful heirs to have said estate distributed to and asked, and prayed the court to appoint a date of hearing upon said account and upon said petition for distribution. The clerk of said Court did on the 3rd day of March, 1921, set a date for hearing on said final account and petition for distribution of the Estate of Washington Pocatello, deceased, to be held on Monday the 14th day of March, 1921, at 10:00 A. M. before the District Judge of the District Court of the First Judicial District in and for the County of Box Elder, in the County Court House, in the Court Room,

of said court in Brigham City, Box Elder County, that the said District Court did not hold said hearing at the time and place appointed and the Judge of said District Court entered a number of orders of continuance of said hearing the last order of continuance being made on the 9th day of January, 1922, fixing the 13th day of February, 1922, at 10:00 A. M. at the court room of said Court, in Brigham City, in said Box Elder County, Utah, for the time and place for a hearing on said final account and petition for distribution. That said District Court failed to hold a hearing on the said matter, and failed, refused and neglected to fix another date for said hearing, and failed, refused and neglected to ever fix another date, or hold a hearing on the final account and petition for distribution of Charles E. Foxley the administrator of the estate of Washington Pocatello deceased, and no action of any manner was taken by the District Court of Box Elder County, upon the estate of Washington Pocatello, deceased, at any time during the twenty years until the Appellants, the heirs at law of the said estate filed this action. The District Court of Box Elder County, Utah, having failed, refused, and neglected to hold a hearing on final account and petition for Distribution filed in said court by the administrator, Charles E. Foxley, the administrator some years subsequent, left the State of Utah for parts unknown and took the full sum of the $995.00 that he reported he received for the deed of Washington Pocatello, to himself, and no action during the twenty years was taken by the District Court in the matter of the Estate of Washington Pocatello, deceased until this suit was filed to quiet title to the undivided one-third interest in said 80 acres of land on the ground there

was no valid delivery of the Washington Pocatello deed, and for accounting for the rents and profits, due to said estate from said undivided one-third interest.

The District Court of the First Juicial District of the State of Utah in and for Box Elder County, the same court wherein the administration of the Estate of Washington Pocatello, deceased, had stood for 20 years without attention heard the case at Bar, and made exhaustive findings of facts, which, in substance held that the burden was upon the appellant to prove positively that the full sum of $3000.00 expressed in the escrow agreement was not paid to the escrow holder and that the burden was upon the appellants to prove by positive evidence that the deed was not wrongfully delivered and that for reason of the failure of the plaintiff to prove positively those facts to the satisfaction of the court, that the court was going to hold that by reason the said deed which on its face recited a consideration at thirty two hundred dollars was regularly filed for record in the office of the county recorder of Box Elder County, Utah, on November 10th, 1919, that there was a valid delivery of the deed. (See Finding 9 transcript 0317).

Appellants appealed from the decision of the lower Court to the Supreme Court of the State of Utah which is the highest court in the State of Utah. The Supreme Court of the State of Utah by its decision filed April 18, 1941, affirmed the decision and judgment of the trial court and Appellants have no further recourse other than to the Supreme Court of the United States and appellants believe that the United States Supreme

Court has jurisdiction in the case for the following reasons:

1. That the courts of the State of Utah have denied to the Appellants the heirs of Washington Pocatello, deceased, who it is admitted by the respondents throughout all the proceedings and found to be a fact by the trial court and the decision of the Supreme Court of the State of Utah are Indians, residents on the Fort Hall Indian Reservation in Idaho, wards of the Government of the United States, and that the respondents are white persons, residents of the State of Utah. That said courts of Utah, the trial court during the trial and the Supreme Court on the appeal denied the said appellants, Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello and Ray Pocatello, the heirs of Washington Pocatello, deceased, a right and privilege accorded to them and enacted for their benefit and protection by the Congress of the United States which enacted the following quoted Statute for the protection of Indians:

> "Trial of Right of Property; Burden of Proof: In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."
>
> Act of Congress, June 30, 1834, c 161, Sec. 22, 4 Stat, 763, R. S. Sec. 2125, U. C. Code Compact Edition, Sec. U. S. A. C. Vol. 25, 194.

This Federal Statute was presented by Appellants to the Trial Court, argued by counsel for Appellants and set out verbatim in Appellants brief to the Trial Court in this case, before the Trial Court rendered its decision.

Despite the fact that this Statute was forcibly brought to the Trial Courts attenion, the Trial Court in the commencement of the courts Finding No. 9, (transcript 0317) in violation of this statute and in violation of the rule of law that has existed for 400 years, that when it is shown that a deed transferring real property was placed in escrow and it is pleaded and asserted that there was a wrongful delivery of that deed, then the burden of proof immediately shifts to the party, or parties claiming under that deed, to prove, to the court a valid delivery of the deed. The Trial Court wrongfully placed those burdens entirely upon the appellants, Indians, non-residents of the State of Utah and thereby relieved the respondents, white persons, of the State of Utah from those burdens, wherein the Trial Court found in said Finding No. 9 (Transcript 0317) as follows:

> "That the plaintiffs offered no evidence at the trial of said cause to the effect that U. F. Diteman, Grantee in said Warranty Deed on escrow with the First National Bank of Pocatello, Idaho, himself, or with one A. I. Grover, wrongfully, unlawfully, corruptly and intentionally, with the intent to defraud the Estate of Washington Pocatello and the heirs of the Estate of Washington Pocatello, paid to said Escrow Holder only $1000.00 on the

purchase price of $3200.00 named in said Deed and Escrow Agreement and wrongfully and unlawfully procured from said depositary the said Warranty Deed; that said plaintiffs offered no testimony to the effect that said depositary bank did unlawfully, wrongfully and contrary to the express terms and obligations of said Escrow Agreement, accept $1000.00 and deliver to said U. F. Diteman and A. I. Grover the said Deed; that the plaintiffs offered no testimony that at the time of the delivery of said Deed, the said U. F. Diteman and A. I. Grover and said depositary Bank, all had knowledge that Washington Pocatello was dead for more than a year previous to the delivery of said Deed and that no administrator had been appointed for said estate and that by reason of the failure to offer evidence on said points heretofore set out in this paragraph, the Court finds against the same; The Court further finds that said Warranty Deed was by the First National Bank of Pocatello, Idaho, delivered to U. F. Diteman, or some person acting for him, and that the said Deed which on its face recited a consideration of $3200.00, was regularly filed for record in the office of the County Recorder of Box Elder County, Utah, on November 10th, 1919, at 4:00 P. M., in Book 15 of Deeds at page 440; that the said U. F. Diteman and A. I. Grover, or either of them, did not unlawfully, illegally or for the purpose of cheating or defrauding the Estate of Washington Pocatello and heirs out of said property, file the said Deed for record in said Box Elder County, Utah, but that said Deed was regularly filed for

record and recorded; that the said A. I. Grover, by the recording of said Deed, did not attempt to take from the estate a valuable property right; that the said A. I. Grover did from November, 1919 claim ownership of said lands, that said Deed was not void but was a valid Deed and passed title to the undivided one-third interest of said property to U. F. Diteman; that the depositary bank had no right to deliver the Deed to said property without a full compliance with the terms and obligations of the Escrow Agreement but the Court finds that the Deed was regular on its face, recited the consideration of $3200.00 and from the evidence in the case the Court finds that said $3200.00 recited in the Deed was paid to said Escrow Holder and that the transaction with said bank was not fraudulent; the Court further finds that although Washington Pocatello had title before the property was decreed to his estate that it was unnecessary to specifically enforce the Escrow Agreement under the provisions of Section 7741 Revised Statutes of Utah, but the Bank, upon payment of the consideration aforesaid, was justified in delivering said Deed to the grantee therein."

This finding placing this burden upon the Appellants is contrary to general law under the facts disclosed by the judgment roll in this case and did deny to the Appellants the rights and privileges guaranteed to them by the United States Statute heretofore set out. This Statute was by Appellants brought to the attention of the Trial Court both by brief and argument before the Court made its findings.

The Supreme Court, of the State of Utah, did in the last six paragraphs of its decision and especially in paragraphs 6 and 7 sustain and affirm every finding that the district court made in its Finding No. 9.

The foregoing quoted United States Statute was distinctly brought to the attention of the Supreme Court of the State of Utah by argument on behalf of the Appellant and by citing and quoting the same in Appellants reply brief filed with said Supreme Court previous to the matter being set down for argument the Appellants on page 27, of said Appellants reply brief said and quoted to the Supreme Court of the State of Utah, as follows:

> "It being admitted that the plaintiffs were, and are, full-blooded Indians, and Wards of the Government, and it was shown that they were not only the presumed owners of the undivided one-third interest in the land, but the legal owners, the burden is placed upon the white man that claims that property to prove good title to it, and we quote the United States Statute on his point, verbatim to said Court.

That Appellants contend that the Supreme Court of the State of Utah, by sustaining and affirming such an erroneous finding as was found by the District Court in Finding No. 9, the Supreme Court of the State of Utah denied to Appellants the rights and privileges granted to them by the Statute of the United States, herein before quoted, and furthermore by such finding and ruling denied to the Appellants the equal protection of the laws for the reason that it being absolutely

admitted and recognized throughout all of the proceedings in this suit that the deed of Washington Pocatello was placed in Escrow and valid delivery of that deed was certainly shown by the Appellants to be invalid delivery the said findings of the District Court is contrary to law and is unjust taking of a valuable property right from these Indians, wards of the Government, non-residents of Utah and given the same to white persons, residents of the State of Utah.

Appellants have been unable so far to find any case where either the Supreme Court of the United States or a Supreme Court of any State has directly passed upon this Statute of the United States but it is obvious on its face that it is a plain and emphatic Statute. That it was enacted by the Congress of the United States as a public policy Statute, for the protection of Indians who are universally recognized not to be conversant with the laws and conduct of the white person. The only comment or citation that Appellants were able to find applying to this section is an annotation to Section 194, Vol 25, U. S. A. C., which is the Statute in question, is an opinion of the Attorney General of the United States which reads as follows:

> "Policy evidence by the Statute:
>
> "This section is evidence of the Policy of the Government to give Indians the benefit of the doubt on questions of fact or construction of treaties or Statutes to their welfare."
>
> 34 Op. Atty. Gen. p 439 (1925).

2. That Appellants pleaded and it is conceded throughout all the proceedings by respondent and found by the Trial Court in its Findings of Fact Nos. 2 and 3 that the Appellants, heirs of Washington Pocatello, deceased, and that Washington Pocatello and Minne Pocatello, his wife, were full blooded Indians, wards of the Government, residing at the Fort Hall Indian Reservation in Idaho, and the Supreme Court in the 3rd paragraph of its decision held in part as follows:

> "Plaintiffs' intestates were Shoshone Indians residing on the Fort Hall Indian Reservation in Idaho. The tract of land in question was not allotted land but was acquired by the ancestry of Washington Pocatello, one Yaotes Owa, through homesteading of the land and the issuance of patent from the United States. Yaotes Owa died in Box Elder County, Utah, in the late eighties."

And then again the Supreme Court of the State of Utah second last paragraph of its decision holds as follows:

> "Appellant questions whether Washington Pocatello and Minnie Pocatello, being Indian wards of the Government, could enter into a valid contract and execute a conveyance. They concede that the period during which, under Congressional enactment, there were restrictions upon alienation, had long since passed at the time of the transaction. As far as revealed by the judgment roll any other conditions prescribed by law re-

quisite to a valid contract by such Indians may have been -- if at all applicable -- complied with."

It was and is the Appellants contention that Washington Pocatello and Minnie Pocatello, being Indians, incompetent Wards of the United States Government could only make a deed to the said premises in the first instance under the rules and regulations of the Secretary of Interior and under, and by the approval of the Secretary of Interior, and Appellants contended throughout the trial and hearing on appeal by argument and setting forth in their briefs the different United States Statutes hereinafter enumerated in support of said contention. That the Courts of the State of Utah, by finding that the Deed of Washington Pocatello and Minnie Pocatello was valid and although delivered long after Washington Pocatello's death its recording made a valid delivery and valid deed, and held that it related back to the time of its execution, and thereby, cut off the rights of the heirs of Washington Pocatello from a valid property right, was denying to and depriving these Appllants, the heirs of Washington Pocatello and Minnie Pocatello a right and privilege extended to them by the laws of the United States, and taking a valuable property right from them, in violation of their Constitutional Rights under the Fourteenth Amendment of the Constitution of the United States.

Appellants herein set forth the United States Statutes, and authority, that Appellants briefed and argued to the Supreme Court of the State of Utah, as follows:

(The Congress of the United States on March 3, 1871, passed an act that is still Supreme law in every state in the United States, as follows:)

"No agreement shall be made by any person with any tribe of Indians, or individual Indians, not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or prospective, or for the granting or procuring any privilege to him, or any other person, in consideration of services for said Indians, relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other monies, claims, demands, or things, under laws or treaties with the United States, in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

"First: Such Agreement shall be in writing, and a duplicate of it delivered to each party.

"Second: It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior of Indian Affairs endorsed upon it."

(There are a number of other provisions contained in the act that we have omitted, but quote the last Section of the Act.)

"All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or Tribe, or anyone else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such ser-

vices, may be recovered by suit in the name of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid."

Act of Congress, March 3, 1871, c. 120, Sec. 3, 16 Stat. 570, U. S. Code, Compact Edition, Sec. 81. U. S. A. C. Vol. 25, 81.

The land involved in the Washington Pocatello Deed was inherited land, and Congress passed another Act on May 27th, 1902, which provides as follows:

"The adult heirs of a deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him, may sell and convey the lands inherited from such decedent, but in case of minor heirs their interest shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the Guardian, **but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved, shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee."**

Act of Congress, May 27th, 1902, c. 88, Sec. 7, 32 Stat. 275; U. S. Code Compact Edition, Sec. 379.

Congress again in 1907 passed an Act directly pertaining to all noncompetent Indians, af follows:

> "Any noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under any law or treaty,**or who may have any interest in any allotment by inheritance,** may sell or convey all or any part of such allotment or such inheritance interest on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribed, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so disposing of his land or interest under the Supervision of the Commissioner of Indian Affairs; and any conveyance made hereunder and approved by the Secretary of the Interior shall convey full title to the land or interest so sold, the same as if fee simple patent had been issued to the Allottee."
>
> Act of Congress, March 1st, 1907, c 2285, 34 Stat. 1018. U. S. Code Compact Edition, Sec. 405.

It is true that when this 80 acres of land in question was patented to the ancestor, Yaotes Owa, 1884, the patent was only subject to a five year restriction but it was not Yaotes Owa who executed the deed in question in this suit. It was Washington Pocatello, who the interest of the land came to by right of inheritance and who was at the time he executed the deed a non-competent Indian as expressed in the Act of Congress passed in 1907, last above quoted and in that section we

have stressed the following words "or who may have any interest in any allotment by inheritance."

This statute does apply to Washington Pocatello, deceased unless it is construed that the property inherited must come through only allotment and the statute does not apply in this case for the reason that the 80 acres in question was patented to the ancestor, Yaotes Owa, under the homestead law.

Turning now to the Act of Congress, May 27, 1902, that Act provides as follows: "'The adult heirs of the deceased to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him, may sell and convey the lands inherited from such deceased, * * * *, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved, shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the Allottee * * * *."

The patent to Yaotes Owa was subject to restriction and the period of restriction may have expired before the death of Yaotes Owa, but Appellants cannot see how that removes the incompetency of Washington Pocatello that existed at the time he executed this deed.

It being admitted by respondents that Washington Pocatello was an incompetent at the time he executed the deed and a Ward of the Government being subject to the restrictions of such incompetency, how could he make a contract for the sale of land that he had inherit-

ed although it did lie outside of the confines of a government reservation, the said Washington Pocatello living on an Indian Reservation and subject to all the restrictions of inconpetency that could not be enforced in any court, against the provisions of the Act of Congress March 3, 1871, heretofore quoted and cited? which provided:

> "No agreement can be made by any person with any tribe of nations, or individual Indians not citizens of the United States for the payment of delivery or any money or any other thing of value, in present or prospective, * * * or procuring any privilege to him or to any other person in consideration of services for said Indian relative to their lands * * * ."

Appellants cannot conceive in the face of the fact that any person cannot go onto the Fort Hall Indian Reservation in Idaho and make any contract with any Indian living on that Reservation that has not received a certificate of competency, pertaining to any of the usual transactions of persons for the services of said Indians relative to their lands even though they might be on the reservation or make any contract with said Indians for the buying or selling of personal property that could be enforced in any court unless such contracts or agreements are executed before a judge of a court of record, and bear the approval of the Secretary of the Interior of Indian Affairs endorsed upon it as is provided in Sec. 2 of the Act of Congress, March 3, 1871, hereinbefore quoted and then turn around and say that in the case at bar that a white man could go

on the Reservation and secure from Washington Pocatello a contract for sale for a valuable tract of land for a very unjust and a inadequate price and that contract is enforcible in any court by virtue of the fact that he inherited the land from Indian ancestors and that the land lay outside the Reservation and no restrictions of alienation run with the land.

The Supreme Court of the State of Utah, in the conclusion of the second last paragraph of its decision said:

> "As far as revealed by the judgment roll any other conditions prescribed by law requisite to a valid contract by such Indians may have been — if at all applicable—complied with."

In answer to that finding of the Supreme Court this is enaction to quiet title, it is admitted by the court that the deed in question was placed in escrow and the fact that it was in escrow was published to the world and the judgment roll in the case shows the delivery of the deed very much in question and the Appellants being Indians the burden was upon the respondents to prove that the deed was valid and validly delivered and it was the duty of the Court of Utah to have before it sufficient proof that the deed was valid and a valid delivery of the deed and that it was in the furtherance of justice before they adopted the fiction of relation back.

Courts have repeatedly held that a restricted Indian cannot convey property by his individual Deed.

Authorities Cited

"Restricted Indians cannot transfer property prior to the termination of their restrictions.

"The plaintiffs undertake to avoid this inescapable conclusion from the authorities, by claiming that restricted Indians cannot by any devise transfer property prior to the termination of their restriction. **This is Settled Law."**

Staley vs Espenlaub, et al., 36 Fed. 2d, 91.

As the Same effect are the following decisions:

Goodman vs Buffalo (8C. C. A.); 162 Fed. 817.
Beck vs Floumoy, 65 Fed. 30.

Sheldon vs Dunbar, 40 Kan. 346; 19 P. 901.

The Supreme Court of the United States in the case of Wiggan vs Connelley, decided in 1896 as follows:

"This treaty of 1867 introduced a new limitation upon the alienability of lands patented to a minor* allottee, that is, the limit of minority. And such limits must be applied to sales voluntary and involuntary, and cut off the right of a guardian to dispose of the estate. The fact that the patent to this allottee had already been issued did not abridge the right to add with the consent of the tribe, a new limitation to the power of the individual Indian in respect to alienation. The land and the allottee were both still under the charge and care of the nation and of the tribe, and they could agree for still further protection, a protec-

tion which no individual was at liberty to challenge."

Wiggins vs Connelley, 163 U. S. 56: 16 Sup. Ct. 914; 41 L. Ed. 69.

Whether the deed executed by Washington Pocatello and Minnie Pocatello, his wife was a valid deed under the Statutes of the United States as herebefore set out and quoted, is a federal question that gives the Supreme Court of the United States Jurisdiction in this case is the contention of Appellants.

3. The District Court of the First Judicial District of the State of Utah in and for Box Elder County, Utah, has and did for a period of 25 years deny to the heirs of Washington Pocatello, deceased, the equal protection of the laws of the State of Utah, in violation of the Fourteenth Amendment of the Constitution of the United States and said Court has permitted a valuable property right to be taken from the heirs of the estate of Washington Pocatello, deceased, and given to residents of the State of Utah, without any just compensation to, or by personal act of the said Heirs, and without any due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States.

The District Court in the case at Bar, found in its Finding No. 3 (Transcript 0316) "That Washington Pocatello died on or about the 27th day of April, 1917." The Supreme Court of the State of Utah in its decision in the closing words of the 3rd paragraph of its decision held as follows: "Washington Pocatello died April 27,

1917—less than three months after executing said deed—":

At the time of Washington Pocatello's death and at the present time under title WILLS AND SUCCESSION the State of Utah had a Statute, Sec. 6405 Civil Laws of the State of Utah, 1917, which at present is Sec. 101-4-2 that reads as follows, to-wit:

> "Property of Intestate Passes to Heirs Subject to Probate Proceedings.
>
> "The property, both real and personal, of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the court, and to the possession of any administrator appointed by the court for the purposes of administration." (C. L. 17, Paragraph 6405.)

Also at the time Washington Pocatello died and at the time the property in question was decreed to his estate there was another Statute in the State of Utah, which reads as follows:

> "Specific Performance of Decedents Contract.
> "When a person, who is bound by contract in writing to convey any real estate or who is bound by contract in writing to assign, transfer or deliver any personal property, shares of capital stock, bonds or other choses in action, dies before making the conveyance, assignments, transfer or delivery; and in all cases when such decedent, if living, might be compelled to make such conveyance, assignment, transfer or delivery, the court may

make a decree authorizing and directing his executor or administrator to convey such real estate, or to assign, transfer or deliver such personal property, shares of capital stock, bonds or other choses in action, to the person entitled thereto. (C. L. 17, 7741.)

Sec. 102-11-26. Revised Statutes of Utah, 1933.

There is no Probate Court in the State of Utah, all Probate Matters are administered by the District Court, in the Probate Division, Section 102-1-6; Revised Statutes of Utah, 1933. Civil Laws, Section 7558, 19 17, Provides:

Powers of Courts and Judges—Code of Civil Procedure Applicable.

The District and Supreme Courts and the Judges sitting in probate and guardianship matters as such exercise all such powers consistent with the provisions of this title as or may be conferred upon those courts or judges respectively in other proceedings; and except as otherwise provided in this title, the provisions of the code of civil procedure shall be applicable to and constitute the rules of practice in probate and guardianship proceedings.

In the case at Bar, it is admitted and found by the Trial Court and the Supreme Court of Utah, that Washington Pocatello, died on or about the 27th day of April, 1917. Under the Statute of Utah, Sec. 101-4-2, Revised Statutes of Utah, 1933, (Sec. 6405 Civil Laws

1917) whatever interest Washington Pocatello, had in the 80 acres in question in the State of Utah, passed immediately upon his death to his heirs, subject to administration by the District Court of Utah. The Judgment Roll in the case at bar, establishes that about 17 months after the death of Washington Pocatello, the District Court of Box Elder County, Utah, decreed to the estate of Washington Pocatello this undivided one-third interest in the 80 acres of land in question, which decrees created in the heirs of the estate of Washington Pocatello, deceased, the highest muniment title subject to administration by the said District Court of Box Elder County. The District Court record, in the Matter of the Estate of Washington Pocatello, deceased, shows, and the District Court Judge who heard this case has found, that a previous Judge, of said District Court, did on the 12th day of January, 1920, appoint one Charles E. Foxley, Administrator of the Estate of Washington Pocatello, deceased, in Box Elder County, Utah; that said Administrator failed to take any steps to recover the alleged undivided one-third interest in said 80 acres of land from A. I. Grover, (See Finding No. 15, transcript 0139) and therein the closing part of said Finding No. 15, the Trial Court said as follows:

> "That there was no evidence offered to the court as to the whereabouts of Charles E. Foxley and the Court finds that the proceedings in the Estate of Washington Pocatello were regular insofar as administered and that from January 12th, 1920, the date of the appointment of the said Charles E. Foxley to the date of the filing of complaint here-

in the said Charles E. Foxley was the duly appointed, qualified and acting administrator of said Washington Pocatello, deceased, and represented the said estate and the heirs of said estate."

(Last part of Finding No. 15, transcript 0320).

Appellants believe that it will be accepted without argument or authority, that the proper administration of the estates of deceased persons, and the protection of estates for deceased persons is the highest duty of any Court, and the District Court Record in the First Judicial District of the State of Utah, in and for Box Elder County, shows; that Letters of Administration on the Estate of Washington Pocatello, deceased, was on the 12th day of January, 1920, issued out of said Court to Charles E. Foxley, and that on that date the said Charles E. Foxley, ascribed to the oath of office as such Administrator, filed the bond required and qualified as such Administrator, and the District Court proceedings, in the estate of Washington Pocatello, deceased, shows that no Inventory in the estate of Washington Pocatello, deceased, was ever filed in said District Court by the said Administrator. The said District Court record in said estate shows that on the 3rd day of March, 1921, that the said Charles E. Foxley, as Administrator of said estate, filed in the District Court, a Final Account and Petition for Settlement thereof, reciting in said account that he had received from the First National Bank of Pocatello, Idaho the proceeds of a Land Contract of Sale by deceased and wife, in the sum of $995.00 setting forth a brief description of the property as follows:

"The property described in the petition for letters and described as an undivided one-third interest in the estate of Yaotes Owa, or one-third of the East 1/2 of S. E. 1/4 of Section 12, Tp. 11 N. R. 3 west S. L. M. had been converted into cash by reason of a contract executed by Washington Pocatello and wife prior to the death of Washington Pocatello and placed in escrow and covering such interest as might be determined as belonging to said Washington Pocatello."

Reporting to District Court, that he had on hand the sum of $995.00 belonging to said estate, and there was due him, the Administrator as an Attorney Fee the sum of $504.00 leaving a balance for the heirs of the Estate of Washington Pocatello, deceased the sum of $491.00 to be distributed between them, and the proceedings in said estate shows that the said Administrator at the same time filed a petition of distribution asking the Court, to distribute this sum among the heirs, and the same time the Administrator prayed the Court to fix a date for hearing on his final account, and petition for distribution, for the approval and settlement of same. That the Clerk of said Court did fix the 14th day of March, 1921, at 10 o'clock A. M., at the Court House, in the Court Room, of said Court, in Brigham City, Box Elder County, Utah as the time and place for settlement of final account and for hearing petition for final distribution, for the 14th day of March, 1921. That on or about the 14th day of March, 1921, an objection to the allowing of the Account of Charles E. Foxley, the Administrator was filed in said cause, in said District Court, protesting to the Court

that no Inventory had been filed in said estate, and also protesting to the Court that the item of $497, Attorney Fees that the said Charles E. Foxley was claiming was unreasonable, and prayed that said account be not allowed or settled. The District Court of Box Elder County, Utah, never took any action on the account, petition of distribution, or the protest on the date set by the Clerk for hearing on the same, except the District Judge of said Court, postponed and continued the date of hearing from time to time, fixing the last day for a hearing as of January 13th, 1922, but on that date the Court held no hearing, and made no order continuing the matter to any other date, and the Judge sitting as District Judge in that Court, and all his successors, including Judge Lewis Jones, the Judge who heard the case, failed, refused and neglected to hold a hearing on the Final Account and Petition for distribution, or consider any matter in the estate of Washington Pocatello, deceased, until this suit was filed.

That owing to said District Court, failing, refusing and neglecting to do its duty, and hold a hearing on the Final Account and Petition for Distribution, as is provided by the Probate Code of the State of Utah, and properly and legally either, approving or disapproving, the said final account, and making a decree of distribution, if such was justifiable, and settling the estate according to law, the said Court failed, refused and neglected to take any action in the matter whatsoever, and thereby permitted and allowed the administrator to take to himself and keep all of the $995.00 received from the Bank, and thereby, took from these Indian heirs, even the paltry sum that U. F.

Diteman and A. I. Grover paid the Escrow Holder for the deed. And after 20 years of the courts denial to these heirs of the equal protection of the probate code laws of the State of Utah, the District Judge of the same District Court, places all the blame on these ignorant Indians, non-residents of the State of Utah, as appear from its Finding, No. 17 (transcript 0320) which reads as follows:

> "The Court finds that on December 3rd, 1919, when Petition for Letters of Administration was filed in the Estate of Washington Pocatello, deceased, that Ray Pocatello was then of the age of seven years, and all of the heirs of Washington Pocatello were older than Ray and at the time of filing of the petition herein that Ray Pocatello was of, the age of twenty-six; that the plaintiffs all knew of the fact that Charles E. Foxley was appointed administrator of said estate during all times from January 12th, 1920, to the date of filing of their complaint herein, and during all of said times these plaintiffs and Charles E. Foxley as administrator of said estate knew that A. I. Grover and these defendants claimed said eighty acres of land and all time had constructive knowledge that the said deed of Washington Pocatello and Minnie Pocatello, his wife placed in escrow with the First National Bank of Pocatello, Idaho, had been delivered and had been regularly recorded and all of the plaintiffs knew all of the facts complained of in their complaint herein at all times after or about November 1st, when Minnie Pcatello and her children appeared in open court

as set out in paragraph 18 of plaintiff's complaint as will more fully hereafter appear.

Finding 18 reads as follows: (transcript 0321)

"That Minnie Pocatello and four of her children appeared in Court on or about November 1st, 1919, at the time of the hearing on Petition for Settlement of the Account and Distribution in the Estate of Yaotes Owa, deceased; that at said time Judge D. Call then Judge of the Court, fully advised them of the nature of the probate proceedings then pending and the said Court then requested said Charles E. Foxley to consult with said Minnie Pocatello and the plaintiffs herein; that a conference was had between said parties and the plaintiffs herein and their mother then signed a request in the matter of the estate of said Washington Pocatello, deceased, requesting the Court to appoint Charles E. Foxley as administrator of said estate, the said request it attached to and made a part of the Petition of Letters of Administration in the Estate of said Washington Pocatello, deceased; that pursuant to said request and after due and legal notice said Charles E. Foxley was as heretofore found, duly and regularly appointed administrator of said estate and thereafter qualified and Letters of Administration were issued to him and that said letters have never been revoked; that in the summer of 1921 Superintendent Donner called Minnie Pocatello and her two oldest daughters, plaintiffs herein, in his office and advised them that Charles E. Foxley had re-

ported he had $995.00 belonging to the Estate of Washington Pocatello and that after deducting attorney's fees and costs there was left about $490.00 for the heirs of, the exact manner of acquiring said money being not explained to said parties; that said Superintendent Donner advised said heirs he did not approve of said settlement of said estate without knowing more about it and spoke something about having the matter investigated; that several months later that said heirs were informed from the Superintendent's office that nothing further could be done in the matter; that at different times thereafter said heirs appealed to said Superintendents office to make investigation of the settlement, but they were always told that nothing could be done; that said heirs did nothing further in said matter until the death of Minnie Pocatello when the heirs sought an investigation but received no encouragement from the Indian Agency and were told nothing could be done and said heirs took no further action until the filing of the complaint herein."

The Trial Court also found in Finding No. 20. (transcript 0321) as follows:

That the physical conditions and improvements on said 80 acres of land have remained practically unchanged since the court decreed the property to the heirs of Yaotes Owa, deceased, except the present owners and their predecessors in interest expended considerable time and money each year in leveling said land for intensive farming pur-

poses and said A. I. Grover purchased from the Utah-Idaho Sugar Company a water right for said premises which he paid the sum $3000.00; that said land was appraised in the Probate proceedings in this Court as having a value of $4900.00 which amount the Court finds was the reasonable cash market value of said premises at said time; that the defendants Amasa L. Clark and Joseph E. Robinson at the time they purchased said property in March, 1925, paid the sum of $12,500.00 which the Court finds was the fair cash market value of said property and that said A. I. Grover and the defendants Amasa L. Clark and Joseph E. Robinson have each year leased the said premises for cash rental."

Appellants have heretofore in this Statement inserted the Trial Courts Finding No. 15, (transcript 0139).

Notwithstanding these Findings of the Trial Court, showing what the Probate proceedings in the estate of Washington Pocatello, deceased, shows, yet the Trial Court and the Supreme Court of Utah, in order to make a title for the white persons, the defendants in this case, against the Indian heirs say that because these Indians have not shown to the satisfaction of the Trial Court that the full amount of the $3000.00 might not have been paid to the Escrow Holder, and because the Deed on its face showed a consideration of $3200.00 and the deed was filed of record, that the court is going to hold that the full amount was paid to the Escrow Holder and that the deed was rightfully delivered, and both the Trial Court and the Supreme Court invoked the fiction of "relation back," to the time of making

the deed so as to cut the heirs out of their inherited interest in the estate.

Appellants contend that the Supreme Court of Utah, by its decision in this case has denied to Appellants the protection of former decisions of the Court on similar facts.

The Supreme Court of Utah has held that the fiction of relation back can only be applied when it is shown that all conditions of an Escrow Agreement has been performed and then only in the furtherance of justice as held in the following cases:

> "There may be circumstances under which the deed placed in escrow, when all the conditions are performed, will relate back to the time of its execution, but this is the case only when justice requires that the doctrine of relation back be enforced. The title, therefore, remained in J. Y. Rich until respondents had complied with the conditions imposed upon him, namely until he had made the final payment and paid the taxes assessed against the property."
>
> Charles E. Foxley vs J. Y. Rich et al. 35 Utah, 162. 99. Pacific. 666.

This is an action to quiet title, and is an action in equity, and respondents prayed for equitable relief, that the title be quieted in them. Appellants contend that the Supreme Court by its former decisions has

held that in such cases, the Court is bound to determine all questions of law as well as fact, therefore the Court should not have striken Appellants Bill of Exceptions and should have taken judicial notice of the District Court record in the probate proceedings in the Estate of Washington Pocatello, deceased. Appellants quote the following cases from the State of Utah:

In Hargraves vs Burton, the Court said:

> "The controling question is, does the evidence disclosed by the record sustain the Trial Court?
>
> "(1) This is an action in equity in which it becomes our duty to determine questions of fact as well as of law.
>
> "(2) The lease to the property in question being admittedly in the plaintiff, the burden was upon the defendant to establish his equitable rights if any he had by a preponderance of the evidence."
>
> Hargraves vs Burton 59 Utah, 575, 206 Pac. 575, 33 L. A. R. 1481.

Appellants quote again from a case heretofore quoted; the same being a very recent case, wherein the Supreme Court said:

> "This being an equity case we are required to examine the evidence and determine the facts for ourselves."

Federal Land Bank of Berkley v Salt Lake Valley Sand and Gravel Company et al 85 Pac 2d, 791.

That decision was rendered on January 3rd, 1939, and the decision in the case at Bar on the 18th day of April, 1940, but the court makes no allusion to this being a case of equity, but holds that it can not even consider the District Court files in the probation of the Estate of Washington Pocatello, deceased, for the reason that they are part of the Bill of Exceptions, and because the Court struck said Bill the Court can not consider any of the facts disclosed by the evidence.

The Supreme Court of Utah has held as follows:

"Of what use are constitutional provisions respecting the rights of property if they may be disregarded by the courts."

Wheelright v Roman. 50 Utah, 10, 15 Pac. 513.

Appellants were and are incompetent under the Probate Code of the laws of the State of Utah, and required the special protection of the Courts of Utah. Section 102-13-20, Revised Statutes of Utah, 1933, Section 7817, Civil Laws of Utah, 1917, reads as follows:

"Incompetent" Ect., Defined.

"The words "incompetent," "mentally incompetent" and "incapable" as used in this title, shall

be construed to mean any person who though not insane, is, by reason of old age, disease, weakness of mind, or from any other cause, unable unassisted to properly manage and take care of himself or his property, and by reason thereof would be likely to be deceived or imposed upon by artful or designing persons".

This Statute certainly applies to and includes these Indians.

Wherefore Appellants respectfully submit, that this case does contain at least four Federal Questions that gives the United States Supreme Court Jurisdiction: First, that the Indians were denied the rights and privileges, extended to them by the Act of Congress, June 30, 1834, c 161, Sec 22, 4 Statute at Large, 763, R. S. Sec. 2126, by placing all burdens on the Indians even burdens that could not be placed on white persons. Second, that under the Statutes of the United States heretofore set out that Washington Pocatello and Minnie Pocatello could not execute a valid deed in the first place; Third, that Appellants have been denied the equal protection of the law, and that their property has been taken away from them against their will and without paying them any remuneration for the same, and not under due process of law, in violation of the rights guaranteed to them under the Fourteenth Amendment of the Constitution of the United States,

and Appellants respectfully request a hearing before the Supreme Court of the United States.

Decision of Supreme Court attached.

Dated this 18th day of August, 1941.

ROY L. BLACK,
Attorney for Petitioners admitted to practice before the Supreme Court of the United States.
Residence: Pocatello, Idaho.

P. C. O'MALLEY,
Attorney for Petitioners.
Residence: Pocatello, Idaho.

In The
Supreme Court of the State of Utah

Laura Morris, Special Administratrix Est. of Washington Pocatello, deceased, et al.,

Plaintiffs and Appellants,

v.

Amasa L. Clark, et al.,

Defendants and Respondents

No. 6248

Filed April 14

McDONOUGH, Justice:

Appeal from a judgment entered in the district court in favor of defendants and against plaintiffs. The action was brought in the lower court by the special adminis tratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, and their heirs to quiet title to a one-third interest in an eighty acre tract of land in Box Elder County, Utah, and for an accounting of the rents, issues and profits. Defendants, respondents here, denied the claims of plaintiffs, asserted full title to said tract in themselves, and prayed a decree quieting same as against plaintiffs. The trial court by its judgment dismissed plaintiff's complaint and granted defendants the relief prayed.

Heretofore, this court, by motion duly interposed by respondents, entered an order striking appellants' bill of exception. The case is, therefore, before us on the judgment roll and the assignments of error applicable

thereto. Nearly all of such assignments go to the sufficiency of the evidence to support the findings of the trial court. Those which require an examination of the stricken bill of exceptions we may not, of course, consider.

Plainttiffs' intestates were Shoshone Indians residing on the Fort Hall Indian Reservation in Idaho. The tract of land in question was not allotted land but was acquired by the ancestor of Washington Pocatello, one Yaotes Owa, through home-steading of the land and the issuance of patent from the United States. Yaotes Owa died in Box Elder County, Utah, in the late eighties. Probate proceedings on her estate were not commenced until 1917. By a decree of distribution made therein, November 7, 1919, a one-third interest in the 80 acre tract in question was decreed to Washington Pocatello. However, about February 2, 1917—more than two years prior to the date of said decree—the said Washington Pocatello and his wife, Minnie, entered into a contract to sell the eighty acre tract to one U. F. Diteman, predecessor in interest of respondents herein, for a consideration of $3200.00, payable $200.00 in cash with annual installments of $300.00 payable in December of each year, the last installment becoming due, therefore, in December 1926. A warranty deed reciting a consideration of $3200.00 was executed by Washington and his wife, Minnie, as sole heirs of Yaotes Owa, to the 80 acre tract, and said deed was deposited with the First National Bank of Pocatello, Idaho, as escrow depositary, to be held by it until the full purchase price was paid, and thereupon to be delivered to the grantee therein named. An affidavit

setting forth the terms of the agreement was executed by the cashier of the bank and filed of record in the office of the County Recorder of Box Elder County, Washington Pocatello died April 27, 1917—less than three months after executing said deed—and Minnie, his wife, died May 28, 1928.

On January 12, 1920, one Charles E. Foxley was appointed administrator of the Estate of Washington Pocatello. The deed placed in escrow, as hereinabove recited, was on November 10, 1919 filed of record with the County Recorder of Box Elder County, having been theretofore delivered by the escrow holder to an agent of the grantee therein named.

At the time of the trial, the First National Bank of Pocatello, Idaho, had been liquidated. Foxley, the administrator of the Estate of Washington Pocatello had long since left the jurisdiction of the court. However, it appears from the pleadings that some time after his appointment as administrator and after the date when the deed was recorded, Foxley reported to the probate court that he had received $995.00—property of the estate—from the First National Bank of Pocatello, Idaho. This report was never passed upon by the court.

By their pleadings, in addition to setting forth the facts hereinabove recited, plaintiffs alleged that the deed placed in escrow was delivered by the depositary upon payment of only $1,000 of the consideration recited therein and agreed to be paid, that defendants had full knowledge of such facts when they purchased

the premises and hence were not bona fide purchasers thereof. Upon these issues the trial court found in favor of defendants and against plaintiffs. On the issue of payment vel non of the full consideration to the depositary before the delivery by it of the deed, the court made the following finding:

> " . . . that the depositary bank had no right to deliver the Deed to said property without a full compliance with the terms and obligations of the Escrow Agreement but the Court finds that the Deed was regular on its face, recited the consideration of $3200.00 and from the evidence in the case the Court finds that said $3200.00 recited in the Deed was paid to said Escrow Holder and that the transaction with said Bank was not fraudulent . . . "

Despite the striking of their bill of exceptions, appellants argue that such finding is not supported by the evidence. They contend that by the admissions in defendants' pleadings that Foxley, Administrator, had reported in the estate proceedings the receipt of only $1,000.00 from the depositary bank and that the affidavit of the cashier of such bank hereinabove adverted to, setting forth the terms of the escrow was placed of record, plus the record of the probate proceedings in the Estate of Washington Pocatello—of which though contained in the stricken bill of exceptions they contend we must nevertheless take judicial notice—it is conclusively shown that the escrow deed was delivered without performance of the condition. With this contention we cannot agree. The report of

the administrator was never heard or passed on by the probate court. We cannot say that it necessarily spoke the truth with respect to the amount received by the administrator from the bank, nor that the report establishes that the bank delivered to him the total amount paid by the grantee in the deed, especially since the stricken bill may contain evidence which precludes any inference whatever which might possibly be drawn therefrom.

Appellants make the further contention that even though the condition of the escrow was fully performed at the time of the delivery of the deed, nevertheless since delivery was made subsequent to the death of Washington Pocatello, it was an invalid delivery, and passed no title—the death of the principal revoking the authority of the agent depositary. They cite 2 C.J.S. 1174 which discusses the rule that an agent's authority is ordinarily terminated by the death of his principal. However, this text and the cases there cited have no application to an escrow depositary. The rule with respect thereto is correctly stated at p. 878 of 21 C.J. as follows:

> "Until the escrow contract has been made, the depositary has no rights or authority enforceable at Law, but when it has been made and the instrument deposited, he becomes the agent of both parties, and the death of a party prior to the performance of the condition, does not affect the depositary's obligation to perform the duties

> imposed upon him by the escrow contract. When the condition upon which the instrument is to take effect is performed, the depositary becomes a mere agent or trustee of the grantee and his possession is equivalent to possession by the grantee."

See also, 7 Thompson on Real Property, Permanent Edition, Sec. 4205, p. 679.

Argument is made, in favor of appellant's title, to the effect that by the decree determining heirship and of distribution in the estate of Yaotes Owa there was distributed to the estate of Washington Pocatello a one-third interest therein, and that such decree establishes title of the heirs. Further, that title to such interest having vested in the heirs of Washington Pocatello upon the latter's death, it could thereafter be divested only by the act of the heirs themselves or by decree of a competent court. But all this disregards the escrow deed executed by the heirs' intestates and the finding of the court that the agreed purchase price was paid to the escrow holder at the time of delivery of the deed. Under such findings by virtue of the doctrine of relation back of title to the time of delivery of the deed (which we consider applicable under the facts as found by the trial court), in effect, no interest vested in the heirs or in his estate. Should Washington Pocatello have lived until the date of the decree of distribution in the Estate of Yaotes Owa, and the

court have then decreed to him the one-third interest, the conditions of the escrow agreement having in the meantime been fully complied with by the grantee in the escrow deed and the deed delivered, the decree of the court would merely confirm the title thereto warranted in the deed. The same result is effected by delivery upon performance of the conditions after death of the grantor.

Appellant questions whether Washington and Minnie Pocatello, being Indian wards of the government, could enter into a valid contract and execute a conveyance. They concede that the period during which, under Congressional enactment, there were restrictions upon alienation, had long since passed at the time of the transaction. As far as revealed by the judgment roll any other conditions prescribed by law requisite to a valid contract by such Indians may have been—if at all applicable—complied with.

In view of our holding that we may not on the record before us disturb the finding of the trial court to the effect that there was full compliance with the condition of the escrow before delivery of the deed to the grantee therein, it becomes unnecessary to discuss the court's holding that plaintiff's action was barred by the statue of limitations or to consider the question discussed in appellants' briefs relative to whether defendants were innocent purchasers for value, as

found by the trial court, or whether such purchaser from a grantee who wrongfully obtained a deed deposited in escrow is vested with title.

The judgment of the district court is affirmed. Costs to respondent.

WE CONCUR:

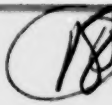
DAVID W. MOFFAT,
Chief Justice

JAMES H. WOLFE,
Justice

MARTIN M. LARSON,
Justice

EUGENE E. PRATT,
Justice

Rehearing denied on July 16, 1941



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 736

LAURA MORRIS, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, His Wife, Both Deceased, et al.,

Appellants,

vs.

AMASA L. CLARK, JOSEPH E. ROBINSON and BOX ELDER COUNTY, UTAH.

APPEAL FROM THE SUPREME COURT OF THE STATE OF UTAH.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

William J. Lowe,
Dean F. Brayton,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 736

LAURA MORRIS, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, His Wife, both Deceased, and LUCY POCATELLO JOHNSON, MAUDE POCATELLO RACEHORSE, JOSEPHINE POCATELLO and RAY POCATELLO, Heirs of Washington Pocatello and Minnie Pocatello, Deceased,

Plaintiffs and Appellants,

vs.

AMASA L. CLARK, JOSEPH E. ROBINSON and BOX ELDER COUNTY, UTAH,

Defendants and Respondents.

MOTION TO DISMISS APPEAL.

To the Honorable Supreme Court of the United States:

Come now the appellees, Amasa L. Clark and Joseph E. Robinson, and each of them, and move this Honorable Court to dismiss the appeal herein for the reasons and upon the grounds following:

1. That the record affirmatively shows that no Federal question is involved in this action.

2. That no Federal statute or treaty is involved and the State court has made no judgment nor has there been any holding as to a Federal statute or treaty.

3. That no State statute has been construed nor has judgment been rendered holding a State statute valid as against an attack on Federal grounds and that the validity of a State statute is not drawn in question on the ground of its being repugnant to the Constitution, Treaties or Laws of the United States.

4. That the decision of the State trial court and the affirmance of said judgment by the Supreme Court of the State of Utah are not based upon the determination of any Federal questions.

5. That the questions now raised were not raised and relied on in the State courts.

6. That no substantial question is raised for even if there were error and even if this error involved a Federal question, such error would not be substantial or prejudicial because the trial court in its Findings of Fact #27 and #28 based its decision upon ratification, estoppel, *laches* and the running of the statute of limitations as well as upon the grounds argued on appeal, which said former grounds alone would be enough to support the decision of the lower court.

7. The Bill of Exceptions on appeal to the Supreme Court of the State of Utah were stricken and no evidence can be reviewed by this Honorable Court as there is no evidence in the record.

This motion is supported by the records and files in said cause and by the objections of appellees to the jurisdiction of this Honorable Court heretofore served upon appellants and their attorneys and filed herein.

Dated this 24th day of September, 1941.

AMASA L. CLARK AND
JOSEPH E. ROBINSON,
By their attorneys,
WILLIAM J. LOWE,
DEAN F. BRAYTON.
1001-5 Walker Bank Building,
Salt Lake City, Utah.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 736

LAURA MORRIS, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, His Wife, Both Deceased, and LUCY POCATELLO JOHNSON, MAUDE POCATELLO RACEHORSE, JOSEPHINE POCATELLO and RAY POCATELLO, Heirs of Washington Pocatello and Minnie Pocatello, Deceased.

Plaintiffs and Appellants,

vs.

AMASA L. CLARK, JOSEPH E. ROBINSON and BOX ELDER COUNTY, UTAH,

Defendants and Respondents.

RESPONDENTS' STATEMENT DISCLOSING GROUNDS AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

To the Honorable Supreme Court of the United States:

Come now the respondents, Amasa L. Clark and Joseph E. Robinson, and respectfully submit that this Honorable Court has no jurisdiction on appeal in this matter for the reasons following:

1. That the record affirmatively shows that no Federal question is involved. That the District Court of the First

Judicial District of the State of Utah entered its Findings and Decree in this action, that after an appeal to the Supreme Court of the State of Utah, by a unanimous decision, the judgment of the trial court was affirmed and that said judgment is final and not subject to review by this Honorable Court.

2. That no Federal statute or treaty is involved and the State court has made no judgment nor has there been any holding as to a Federal statute or treaty.

3. That no State statute has been construed nor has a judgment been rendered holding a State statute to be valid as against an attack on Federal grounds and that the validity of a State statute is not drawn in question on the ground of its being repugnant to the Constitution, Treaties or Laws of the United States.

4. That the decision of the State court is not based upon the determination of any Federal question.

5. That the questions now raised were not raised and relied on in the State courts.

6. That no substantial question is raised; even if there were error and even if this error involved a Federal question, such error would not be substantial or prejudicial because the trial court in its Findings of Fact #27 and #28 based its decision upon ratification, estoppel, *laches* and the running of the statute of limitations, as well as upon the grounds argued on appeal. These grounds alone would be enough to support the decision of the lower court.

7. The Bill of Exceptions on appeal to the Supreme Court of the State of Utah were stricken and nothing can be reviewed by this Honorable Court as there is no evidence in the record.

A review of appellants' petition, assignments and statements clearly discloses no Federal question. In reviewing the matters set forth by appellants, we will consider them

in the order in which appellants set them forth disregarding repetition.

I. Appellants' first contention is that the State District Court wrongfully placed upon the appellants the burden of proving compliance with the terms of the escrow agreement. They base this contention upon 25 U.S.C.A. Sec. 194, which provides:

> "In all trials about the right of property in which an Indian may be a party on one side and a White person on the other, the burden of proof shall rest upon the White person whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

This statute has two possible interpretations, one is that it places the burden of going forward with the evidence upon the White person, the other is that it places the burden of persuasion upon the White person.

If it is construed as dealing with the burden of going forward with the evidence, respondents affirmatively satisfied this burden. Respondents showed, as the lower court expressly found, that they claimed under a deed which had been properly recorded. By this showing the presumption arose that the conditions of the Escrow were fully complied with.

> *Merchants & Farmers State Bank by Peyton* v. *Olson*, 189 Minn. 528, 215 N. W. 366, 89 A. L. R. 1289.

In *Swain* v. *McMillan*, 31 Mont. 433, 76 Pac. 943, 946, the Court, in an identical situation where the grantor was claiming that the deed was delivered by the depository without compliance with the terms of the escrow, said:

> "When one appears of record to be the owner in fee of real estate, another alleging the contrary must show the fact by clear and convincing proof".

Thus, even though the ultimate burden of going forward with the evidence was placed upon the appellants, such a placing of the burden would be correct in spite of the statute providing the burden should be on the White person for, although the burden was originally upon the respondents, this burden shifted to the appellants when the respondents entered evidence from which the presumption arose that the conditions were complied with. The lower court found that the appellants offered no evidence to rebut this presumption so a Finding against the appellants was justified.

If, on the other hand, the statute be construed to deal with burden of persuasion rather than with the burden of going forward with the evidence, error cannot be shown because that would involve a weighing of the evidence and there is no evidence to be reviewed by this Honorable Court since the appellants' Bill of Exceptions has been stricken.

The above discussion assumes the burden was placed upon appellants. However, nowhere in the record did the District Court mention burden of proof. In the absence of a showing that the District Court was in error, it must be assumed on appeal that the correct law was applied by the lower court. Thus, if the burden should have been on respondents, it must be assumed that it was actually so placed by the lower court. Appellants attempt to rebut this presumption by setting forth the Ninth Finding of Fact. This Finding states, among other things, that

> "From the evidence in the case, the Court finds that said $3200.00 recited in the deed was paid to said Escrow Holder."

This indicates that respondents offered affirmative evidence as to the payment of the $3200.00. Appellants' contention that this Finding indicates that appellants failed to offer any evidence and that therefore the court found against them is unsound for the court would have said:

> "and from the *lack* of evidence in the case"

if the court had meant what the appellants contend.

Appellants made no Assignment of Error as to the burden of proof so the entire question argued above is not even before the appellate court.

II. Appellants' second contention is that there was no allegation that the conditions of the Escrow Agreement were complied with and that there was no allegation of rightful delivery.

This involves no Federal question. 25 U. S. C. A. Sec. 194, quoted above, deals only with burden of proof and has nothing to do with pleading. The Fourteenth Amendment would not be violated even if there were no such allegations as referred to by appellants for the question of compliance with the terms of the Escrow Agreement was fully litigated in the District Court and a fair trial was had. So, even if an error of law was made, it would not be a violation of due process.

Furthermore, in paragraph 9 of respondents' answer, there in fact is an allegation "that the First National Bank of Pocatello, Idaho, delivered said deed". A reasonable interpretation of such allegation would be that a proper, rather than an improper, delivery is referred to. Also, respondents alleged "which on its face recited a consideration of $3200.00, was regularly filed for record". As shown by the above cited cases of *Swain* v. *McMillan*, 31 Mont. 433, 76 Pac. 943, 946, and *Merchants & Farmers State Bank by Peyton* v. *Olson*, 189 Minn. 528, 215 N. W. 366, 89 A. L. R. 1289, this is an allegation of facts sufficient to create a presumption of proper delivery. Therefore, appellants' contention that respondents made no such allegation is erroneous.

Appellants made no Assignment of Error concerning respondents' pleadings. Also this question is not argued in either the District Court or Supreme Court so it is not now reviewable by the Honorable Supreme Court of the United States.

III. Appellants' third contention is that the respondents' predecessor in interest had notice by reason of the Recording Act of a non-compliance with the terms of the Escrow Agreement. Such notice of a non-compliance would be impossible since the trial court found that the conditions were in fact complied with. Also as the trial court pointed out in Findings of Fact #13 and in its Memorandum of Decision, there was nothing recorded to put the respondents or respondents' predecessor in interest on notice of the alleged defect.

Even if there were error in this regard there is no Federal question involved. Appellants indiscriminately say throughout their Petition for Appeal that any and all alleged errors at law that they have attempted to show deprive them of equal protection and of due process of law. If their contention is correct, all decisions of a State Supreme Court could be reviewed by the United States Supreme Court. Appellants had a fair trial in the lower court and have not been deprived of their constitutional rights.

There is no Assignment of Error covering this point, nor was it argued in the State Supreme Court of Utah, so this question cannot now be raised.

IV. Appellants' next contention is that the depository of the deed in escrow could not deliver the deed after the conditions were complied with because the Grantor had since died and 102-11-26 Revised Statutes of Utah, 1933, entitled "Specific Performance of Decedents' Contracts", provides, "when a person who is bound by a contract in writing to convey real estate * * * dies * * * the Court may make a decree authorizing and directing his Executor or administrator to convey."

No Federal question is involved. At most, it is an error of State law, and the State Supreme Court of Utah, not

the United States Supreme Court, is the final arbiter in such matters. Appellants again claim a violation of the Fourteenth Amendment but even if there were an error of law, no constitutional rights are affected.

Furthermore, there is no error. The Utah statute refers to *contracts* to convey. A deed placed in escrow is a conveyance rather than a contract and there thus is no question of specific performance involved.

V. Appellants' next contention is that the deed in escrow was invalid because the approval of the Secretary of the Interior was not obtained.

Contrary to appellants' statement in their Petition for Appeal, it was neither admitted by respondents nor found to be a fact by the court, that Washington and Minnie Pocatello were wards of the Government. The admission covers only the appellants and not appellants' ancestors.

As the State Supreme Court stated in its opinion "as far as revealed by the judgment roll any other conditions prescribed by law requisite to a valid contract by such Indians may have been, * * * if at all applicable * * * complied with".

There has been no showing that the statute applies to the factual situation presented in this case. Although the appellants alleged in their complaint that the statute applied, there was not a finding to the effect that Washington and Minnie Pocatello were Tribal Indians, and since it is presumed on appeal that the lower court committed no error, it must now be assumed that Pocatello and his wife, like Pocatello's parents Pooe and Yaotes Owa, were citizens of the United States as shown by Finding of Fact #25, and that thus 25 U. S. C. A. 81 would not apply because of the express exception of citizens of the United States.

Following a similar line of reasoning, now that the Bill of Exceptions has been stricken and there is no evidence

before the Court, it is impossible to determine whether or not approval of the Secretary of Interior was in fact given. And since error is not presumed on appeal, it must be assumed that such approval was given.

The other two statutes cited by appellants concerning approval by the Secretary of Interior, if applicable, must also be assumed to have been complied with. They likewise are inapplicable, however, for 25 U. S. C. A. 379, May 27, 1902, c. 888, Sec. 7, 32 Stat. 275, refers to a deed with restrictions, and the restrictions in the deed in this case had expired. The wording of the statute indicates that the approval of the Secretary refers only to a conveyance in violation of the restrictions contained in the deed since the statute provides that a deed "when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued by allottee".

Furthermore, the statute deals only with allotted lands and the land involved in this case was homestead land acquired by a citizen as shown by Finding of Fact #25.

The other statute, 25 U. S. C. A. 405 (Mar. 1, 1907, c. 2285, 34 Stat. 1018) refers to non-competent Indians. There has been no Finding that Pocatello was insane nor has there been a Finding that he was not a citizen of the United States. Furthermore, the statute refers to allotted land and this was homestead land. It deals with restrictions imposed by the patent as shown by the wording of the statute that a conveyance approved by the Secretary "shall convey full title to the land or interests so sold, the same as if fee simple patent had been issued to the allottee". Therefore, the statute is inapplicable to the case at bar.

Also the latter statute is now introduced for the first time by appellants. They should not be precluded from raising such an objection.

VI. Appellants' next contention is that respondent had the burden of proof on appeal to the State Supreme Court of Utah and that therefore the State Supreme Court could not strike their Bill of Exceptions. This involves no Federal question.

Furthermore, this objection was raised for the first time in the appellants' Petition for Rehearing before the State Supreme Court, which is too late a date to raise such an objection.

Appellants state two reasons why the burden should have been on the respondent on the appeal to the State Supreme Court. One is that 25 U. S. C. A. Sec. 194 places the burden of proof in the litigation with Indians upon the White person and that that burden of proof is not only in the lower court but also continues on appeal. This contention is unsound. The intention of the Legislature would not be to upset the general rule on appeal that it is the appellants duty to show error. A reasonable construction of the statute would be that it deals only with burden of proof in the lower court where the evidence was presented. If this were not the correct construction of the statute, in a law action where the questions of fact are not reviewable, the statute would always be violated.

Appellants' second reason why the burden should have been placed on respondent on appeal is that this is an equity action in which questions of both law and fact are reviewed. This involves no Federal question. Furthermore, it is an unsound contention for even in an equity action the burden is always upon the appellant.

Tatsuno v. *Kasai*, 70 Utah 203, 259 Pac. 318.

The court in *Escamilla* v. *Pingree*, 44 Ut. 421, 427; 141 Pac. 103, the Utah court said:

> "This is * * * an equity case, and, therefore, unless the presumption of correctness of the proceeding

and judgment is clearly overcome, the judgment must prevail".

In the case of *Hargraves* v. *Burton*, 59 Ut. 575, 585; 206 Pac. 262, cited by appellants to sustain their contention, the Utah court said:

> "But, as stated in the beginning, this is a case in equity in which we are required to determine the facts as well as the law, and in which we are not bound by the Finding of the trial court, if, in our opinion, they are clearly against the weight of the evidence".

VII. Appellants' next contention is that the administrator's Report, stating that part of the purchase price was received, was entitled to judicial notice in the State Supreme Court, and so the Supreme Court erred in affirming the trial court findings that the full purchase price was paid.

This involves no Federal question.

The probate proceeding which appellants claim is entitled to judicial notice is no more a judicial proceeding than is the present case. It is not contended by appellants that the evidence in the present case is entitled to judicial notice, and the evidence in the present case is not before the court because the Bill of Exceptions was stricken. It would seem even clearer that evidence in another proceeding is not entitled to judicial notice when evidence in a case at bar is not so entitled.

In Re Evans, 42 Utah 282, 130 Pac. 217.

23 C. J., Sec. 1920, page 113, Footnote (a) provides:

> "As a rule the judgment and proceeding in another case than that on trial, even between the same parties, will not be taken notice of by the court of its own motion. Otherwise the matters might be considered that a party has no opportunity to meet and explain".

If appellants' contention were correct the State Supreme Court would be bound to disregard the Findings of Fact of

the lower court because of the mere filing of an account by an administrator in another proceeding setting forth certain facts contrary to those facts found by the trial court, when such account had not even been approved by the probate court. We submit this would be incorrect.

As the State Supreme Court points out this is a question concerning weight of the evidence which question cannot now be reviewed because the Bill of Exceptions has been stricken.

VIII. Appellants' next contention deals with the delivery of the deed out of escrow by the depository. Appellants state that delivery can be made, and the doctrine of relation back to the time of delivery in escrow can be applied, only after a compliance with the conditions of the escrow agreement. With this we agree, but the lower court expressly found that the conditions were complied with. Appellants also state that the doctrine of relation back was wrongly applied because such doctrine should be applied only in the "furtherance of justice".

We submit that these contentions involve no Federal question.

Furthermore, the application of the doctrine of relation back does result in a "furtherance of justice".

Foxley v. *Rich*, et al., 35 Utah 162; 99 Pac. 666, cited by appellants, is a case in which rights of third parties have intervened. Here the heirs gave no value for the land and so are not intervening third parties. Indeed, they would be unjustly enriched if they were allowed to retain land which had been sold by their ancestor. For they would then inherit both the land and the purchase price (which the court found was paid).

IX. Appellants' Assignment of Error #10 is far from clear. They state that the Supreme Court of Utah erred in saying "Should Washington Pocatello have lived until

the date of the decree of distribution of the Estate of Yaotes Owa, and the court have then decreed to him the undivided one-third interest, the conditions of the escrow agreement having in the meantime been fully complied with by the grantee in the escrow deed and the deed delivered, the decree of the court would merely confirm the title warranted by the deed. The same result is effected by delivery upon performance of the conditions after the grantors death."

In the first place, this is merely a hypothetical situation and even if the court were wrong there would be no grounds for reversal.

In the second place, there is no Federal question.

In the third place, there was was no error. Appellants state that the court presumed a compliance with the terms of the conditions of the escrow agreement contrary to the record in the case. The evidence is not before the appellate court since the Bill of Exceptions has been stricken and the only thing the record discloses as to a compliance with the conditions is the statement previously quoted in Findings of Fact #9 that "From the evidence in the case the court finds that said $3200.00 recited in the deed was paid to said escrow holder".

Respondents fail to see how 101-4-2 Revised Statutes of Utah 1933, dealing with administration of estates, is at all relevant.

X. In the latter part of their statements of jurisdiction, appellants say that they, appellants, were incompetent, quoting 102-13-20 Revised Statutes of Utah 1933. The statute by its terms applies to those actually incapable of caring for property. Such a determination of incompetency would not be controlled by Federal statute making all Indians wards of the Government.

But, appellants fail to show that this statute dealing with incompetency is relevant to this case. They state

broadly that the appellants because incompetent were entitled to "special protection of the courts of Utah". We cannot see how a probate statute has any connection with the case at bar which concerns a delivery *inter vivos*. If the statute is applicable, we cannot see that it provides for "special protection". If it provides for special protection, we cannot see how appellants were denied such protection. And, finally, if denied such protection, we cannot see how the United States Supreme Court can review the question inasmuch as no Assignment of Error covers the point and there is no Federal question involved.

XI. There are several allusions by appellants throughout their petition for appeal to the fact that appellants are nonresidents of Utah and respondents are residents, implying that the Utah courts have discriminated in favor of their own residents. Appellants do not go beyond this mere generality, however, and in the absence of specific instances of discrimination such allusion should be disregarded. The record discloses that the plaintiffs voluntarily came into the State courts and petitioned for the appointment of an administratrix over the estates of Washington Pocatello and Minnie Pocatello, his wife, both deceased. Such administratrix was appointed in the probate court of Box Elder County. The action was prosecuted voluntarily by the plaintiffs in the State court by themselves and through the special administratrix. Findings of Fact and Conclusions of Law were fully made by the trial court and judgment was entered thereon. Appeal was taken from this judgment to the Supreme Court of the State of Utah and the judgment of the trial court was unanimously affirmed by the Supreme Court.

XII. Even if there were error and even if this error involved a Federal question, the error would not be prejudicial because the trial court, in Findings of Fact #27 and

#28, based its decision upon ratification, estoppel, *laches* and the running of the statute of limitations, as well as upon the grounds argued on appeal. These grounds alone would be enough to support the decision of the lower court.

Therefore, it is respectfully submitted that appellants have no grounds for appeal; that no Federal question is involved; that the appeal does not come within the statutory provisions for an appeal from the State courts to the Supreme Court of the United States and that this appeal should be dismissed.

Respectfully submitted,

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DEAN F. BRAYTON,
Attorneys for Respondents,
Amasa L. Clark and Joseph E. Robinson.

No. 736

Supreme Court, U. S.
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In The

Supreme Court of the United States

Laura Morris, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased and Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello, Heirs of Washington Pocatello and Minnie Pocatello, both deceased.

Plaintiffs and Appellants,

vs

Amasa L. Clark, Joseph E. Robinson, and Box Elder County, Utah,

Defendants and Respondents.

BRIEF

BRIEF OF APPELLANTS IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS APPEAL

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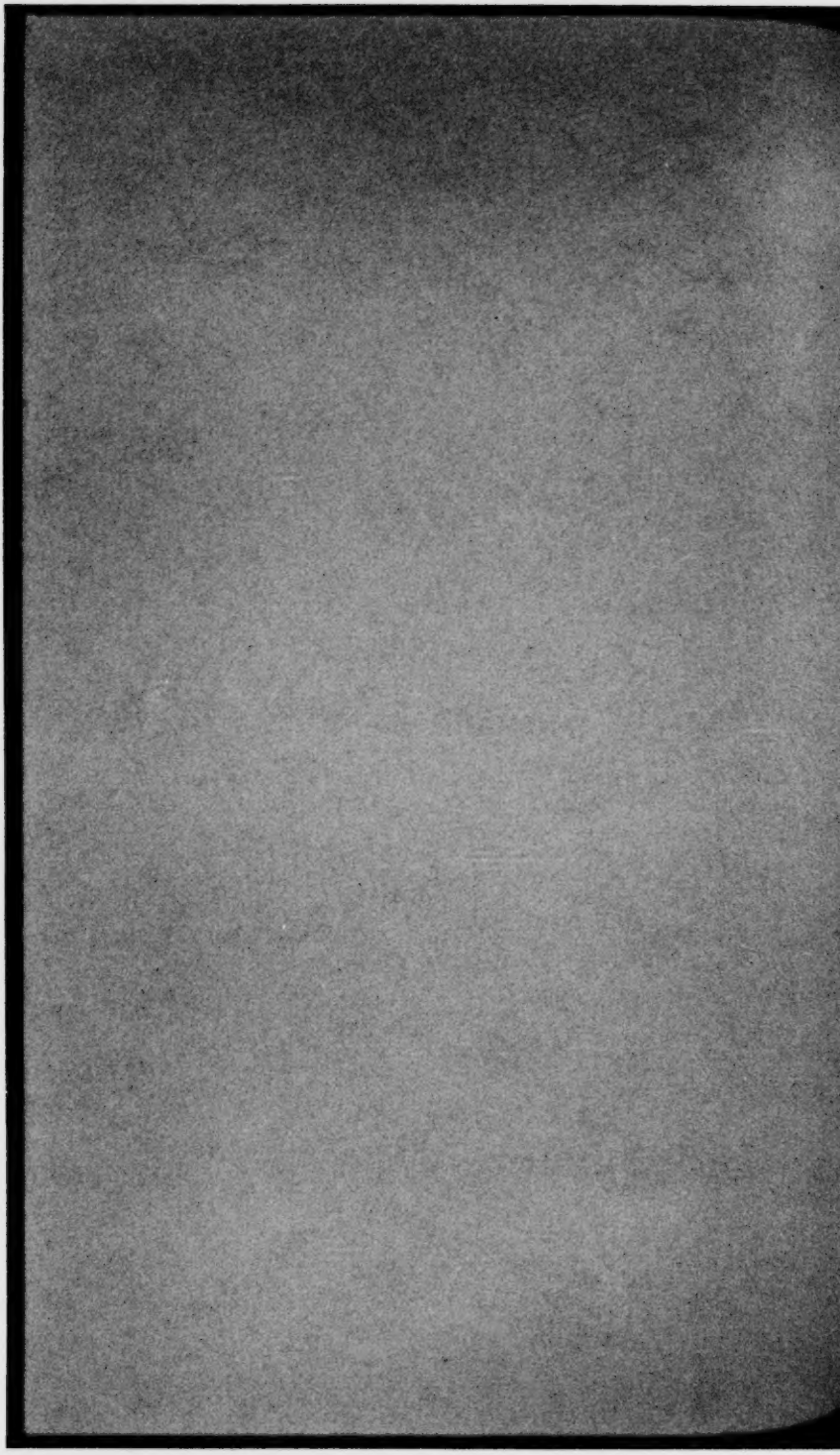

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In The
Supreme Court of the United States

Laura Morris, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased and Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello, Heirs of Washington Pocatello and Minnie Pocatello, both deceased.

Plaintiffs and Appellants,

vs

Amasa L. Clark, Joseph E. Robinson, and Box Elder County, Utah,

Defendants and Respondents.

BRIEF

BRIEF OF APPELLANTS IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS APPEAL

Comes now the Appellants, Laura Morris, Special Administratrix of the Estate of Washington Pocatello and Minnie Pocatello, his wife, both deceased and Lucy Pocatello Johnson, Maud Pocatello Racehorse, Josephine Pocatello, and Ray Pocatello, Heirs of Washington Pocatello and Minnie Pocatello, both deceased, and each of them and object to Respondents' motion to dismiss the appeal herein, and files this brief in refutation of Respondents reasons for dismissal.

STATEMENT OF CASE

On May 31, 1884 the United States of America issued patent to an Indian woman, Yaotes Owa, widow of Pooe Owa, to 80 acres of land in Box Elder County, Utah, described as follows: E½ of S. E. ¼ of Sec. 12, T. 11 N. R. 3, W. SLM. Said Patent was issued subject to a five year restriction against alienation. As far as known Yaotes Owa died in the late eighties, intestate, leaving surviving her as heirs a natural daughter commonly called Jane, and a stepdaughter, named Bingwa. The stepdaughter, Bingwa, became the wife of Chief Pocatello, an Indian, and was the mother of Washington Pocatello, and grandmother of the heirs of Washington Pocatello, the Appellants in this cause. The half-sister Jane, the natural daughter of Yaotes Owa, as far as known died sometime in the late nineties withut issue, but leaving surviving her a husband named James Brown; that no probate proceedings were ever instituted to determine the heirship of Yaotes Owa or her natural daughter Jane, and right of succession to this 80 acres of land during all of the years until early in 1917; that some years previous to 1917 about 65 acres of this particular 80 acres were irrigated and placed in a high state of cultivation through some system inaugurated by the Church of Jesus Christ of Latter Day Saints, commonly known as the Mormon Church, for the benefit of the Indians living in that locality, in which benefits none of the rightful heirs to the property ever participated, they being ignorant of any interest in same; that in January, 1917, a white man of the name of Albert Saylor being desirous to obtain title to this valuable 80 acres of land, for either

himself or a white person of the name of U. F. Diteman, concluded that Washington Pocatello, a full blooded Indian, living on the Fort Hall Indian Reservation in Idaho, and a ward of the United States Government was the only surviving heir of Yaotes Owa, and of her daughter Jane, and the only one living entitled to inherit the said 80 acres of land, and the said Saylor hunted up Washington Pocatello, on the Fort Hall Indian Reservation in Idaho, and secured from Washington Pocatello, and his wife Minnie Pocatello, a warranty deed dated February 2, 1917 for the full 80 acres of land to U. F. Diteman, grantee, in the deed for the agreed consideration of $3,200.00, the said deed was for all of the said 80 acres, and recited that Washington Pocatello was the only surviving heir of Jane, the daughter of Yaotes Owa; the said Saylor paying to Washington Pocatello $200.00 cash, and the said Arthur Saylor and Washington Pocatello on the 2nd day of February, 1917 placed the said deed in escrow with the First National Bank of Pocatello, Idaho, to be held by the said escrow holder, until the full sum of $3,000.00 was paid into said Bank, for the said Washington Pocatello in payments of $300.00 per year, the first payment to be made on the 20th day of December, 1917, and $300.00 each succeeding 20th day of December, until the full sum of $3,000.00 was paid, and the said deed was not to be delivered until the full amount of $3,000.00 was paid into the Bank for Washington Pocatello; that actual value of the land at this time was at least $15,000.00. The terms of the escrow agreement were written on the back of a large First National Bank envelope, by, and in the hand writing of Arthur Saylor, and the deed was placed in the said envelope,

the said Bank assumed the duty of escrow holder and took possession of said deed; that on the 18th day of April, 1917, that W. D. Service, cashier of said Bank, made and executed a sworn affidavit that the deed was placed with the Bank in escrow, and definitely quoting the terms of the escrow agreement in part as follows:

> "that said deed is now in the possession of the First National Bank of Pocatello, Idaho, and to be delivered to the said U. F. Diteman when all the following payments shall have been made at said Bank for and in behalf of the said Washington Pocatello, to wit: $300.00 on Dec. 20, 1917 and $300.00 on Dec. 20, of each and every year thereafter up and including Dec. 20, 1926;"

that the said Albert Saylor or U. F. Diteman, caused the said affidavit to be filed for record on the 19th day of April, 1917, in the County records of Box Elder, County, Utah, the said affidavit was pleaded verbatim in Paragraph 8 of Appellants' Complaint, Trans. 0186, the making and recording of this affidavit is admitted by the Respondents in Parapragh 8 of their answer wherein they said:

> "Defendants admit that an Affidavit dated April 18, 1917 was recorded on April 19, 1917 at 2:50 P. M. in Book F of Miscellaneous Records in the County Recorder's Office of Box Elder County at Page 613 thereof, and that a copy of said instrument is set out in said Parafraph 8," (Trans. 0230)

that the trial court also found that the terms of the escrow agreement was written on the envelope con-

taining the escrow papers, and that an affidavit was made at the time by the Cashier of said Bank and said affidavit was filed of record, and set forth verbatim in said finding the affidavit, (Finding Number 8, Trans. 0317) that in Finding Number 9, the trial Court finds in part as follows:

> "that the depositary bank had no right to deliver the Deed to said property without full compliance with the terms and obligations of the Escrow Agreement but the Court finds the deed was regular on its face, recited the consideration of $3,200.00 and from the evidence in the case the Court finds that said $3,200.00 recited in the Deed was paid to said Escrow holder and that the transaction with said bank was not Fraudulent," (Finding Number 9, Trans. 0318);

that at the time of the making of the deed and placing it in escrow, Washington Pocatello, signed a waiver of appointment of administrator, and requested that one W. E. Getz, a resident of Box Elder County, Utah, be appointed administrator of the estate of Yaotes Owa, deceased, and qualified as said administrator and acted as such until the close of the administration of said estate; that Washington Pocatello died on or about the 27th day of April, 1917, about 90 days after signing said deed and placing it in escrow; and that Minnie Pocatello, his wife, died about the 28th day of May, 1928, Finding Number 3, (Trans. 0316); also, so found by the Supreme Court of the State of Utah, in their decision at the close of the 3rd Paragraph of said decision, as quoted on Page 105 of the bound volume of

Appellants' petition for appeal to this court; that James Brown, the husband of the natural daughter of Yaotes Owa, called Jane, died sometime previous to 1917, and on June 18, 1918, Letters of Administration was issued to W. G. Getz, on the estate of Jane Brown and her husband, James Brown, for the probation of the same identical 80 acres of land; that both estates were carried on in the District Court of Box Elder County, of Utah, jointly; that on or about the 1st day of November 1919, a hearing was held before Judge Justin D. Call, District Judge of Box Elder County, Utah at Brigham City, Utah for the determination of heirship and distribution of the said 80 acres of land to the rightful heirs of Yaotes Owa, and her daughter Jane; that on the 7th day of November, 1919 the said Judge Justin D. Call did make his findings of fact and conclusions of law, determining the rightful heirs to both estates, finding that at the time of the death of Jane Brown she left no issue, but that she left surviving her a husband by the name of James Brown, and that at the time of the death of James Brown, he left surviving him a son of the name of James S. Brown, and, that James S. Brown was entitled to an undivided ⅔ interest in said land, and that Washington Pocatello was the sole and surviving heir of Bingwa, a daughter of Poe Owa, half-sister of Jane, and that Washington Pocatello's estate is the owner and entitled to an undivided ⅓ interest in said 80 acres of land, and, on the said 7th day of November, 1919, the said Justin D. Call, District Judge did make two decrees, one the estate of Yaotes Owa, setting forth the above stated facts, and decreeing an undivided two-thirds interest of said 80 acres of land to James S. Brown, and an un-

divided one-third interest to the estate of Washington Pocatello, deceased, and made almost an identical decree in the estate of James Brown and Jane Brown; that on the 8th day of November, 1919 both the decrees were filed of record in the County records of Box Elder County, Utah, both decrees were pleaded in Paragraph 6 and made part of Appellants' complaint marked exhibits "C" and "D"; that defendants in their answer admitted all of Paragraph 8 of Plaintiffs' complaint, (Trans. 0229), certified copies of said decrees were admitted in evidence at the trial of the cause; the action of the District Court in making these decrees were not appealed from, and both estates were subsequently settled and closed, and the administrator discharged, and the decrees therefore became final; that on the 7th day of November, 1919 when Judge Justin D. Call made those two decrees he must have figured the value of the said 80 acres of land at that time at $15,000.00 for the reason he decreed a two-third interest to the heirs of the surviving husband of the natural daughter Jane, and one-third to the heirs of the step-daughter Bingwa because the Law of Succession in the State of Utah at that time provided as follows:

> Section 6408 Compiled Laws of Utah, 1917. Titled. Succession in absence of will or marriage contract:
>
> "When any person having title to any estate not otherwise limited by marriage contract dies without disposing of the estate by will, it is succeeded to and must be distributed, unless otherwise ex-

pressly provided in this title, or in the probate court, subject to the payment of his debts, in the following manner:

Paragraph 3. Surviving husband or wife; no issue;

"If the decedent leave no issue, all of the estate, real and personal of which the decedent died seized and possessed, if not over $5,000.00 in value, exclusive of debts and expenses, goes to the surviving husband or wife, and if over that value, $5,000.00 in value thereof goes to the surviving husband or wife, and the excess goes one-half to the surviving husband or wife, and the other half to the decedents father and mother, in equal shares, and if either be dead, the whole of said half goes to the other; if there be no father or mother, then the one-half of such excess goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother and sister, by right of representation; if the decedent leave no issue, nor husband and wife, the estate must go to his father and mother in equal shares, or if either be dead then to the other".

In the States of Utah at that time, and now, the half blood inherited equally with full blood.

The decree in the Yaotes Estate, made a part of appellants complaint, "exhibit "C", (transcript 0202) contains the following order of the court:

"It is ordered, adjudged and decreed that James

S. Brown is the son of James Brown who was the husband and sole surviving heir of Jane Brown, who was the sole and surviving heir of Yaotes Owa, the surviving wife of Tosewitch or Poe Owa, is the owner and entitled to ⅔rds of the property now in the possession of the said administrator of the estate of Yaotes Owa and of Jane Brown and of James Brown, her husband, and the said Washington Pocatello was the sole and surviving heir of Bingwa a daughter of Tosewitch or Poe Owa, by a first marriage and his estate is the owner of and entitled to ⅓rd interest in all of the property now in the possession of the said Administrator of Yaotes Owa, deceased, and of Jane Brown and James Brown, her husband", (trans. 0202).

The foregoing is cited to show that at the time the decree was made, the Court had to value the property at $15,000.00 and that the decree was made to the estate of Washington Pocatello, deceased, and not to him personally, it being known to all that Washington Pocatello was dead, that previous thereto on the 8th day of November 1918 one A. I. Grover had obtained from U. F. Diteman the grantee named in the Washington Pocatello and Minnie Pocatello, deed then in escrow with the Bank, a power of attorney, delegating the said A. I. Grover to act in the place and stead of U. F. Diteman in all matters pertaining to said escrow agreement, and that delivery of the deed to be made to the said A. I. Grover, which said Power of Attorney was filed with the escrow holder (See stipulation filed at the time of trial at request of counsel for respon-

dents—trans. 0245); that on or about the 8th day of November, 1919 that A. I. Grover exercising this power of attorney filed with the First National Bank of Pocatello, Idaho, the escrow holder, a certified copy of the decree of distribution in the estate of Yaotes Owa, and paying to the said Bank only the sum of $1,000.00, just one third the amount that was to be paid to the Bank before the deed could be delivered, it being evident that A. L. Grover figured that the estate of Washington Pocatello, being only ⅓ interest in the land, that the estate should only receive $1,000.00 for the deed, and the said escrow holder on or about the 8th day of November 1919, some 19 months after the death of Washington Pocatello, accepted only the $1,000.00 on said escrow agreement and wrongfully delivered the deed to A. I. Grover, or U. F. Diteman, but the power of attorney to A. I. Grover being on file with the Bank it is reasonable to say that the delivery of the deed was made to A. I. Grover, and the said A. I. Grover on the 10th day of November, 1919, filed the said deed of record in the County Recorder's office of Box Elder County, Utah; that the said A. I. Grover did on the 7th day of November, 1919, secure from James S. Brown and Nancy Brown his wife, a warranty deed to U. F. Diteman for the undivided ⅔ interest that was decreed to James S. Brown paying Brown the sum of $2,000.00 for his interest, and on November the 3rd, U. F. Diteman and Josie Diteman, his wife, executed a quit claim deed of all their interests in the entire 80 acres to A. I. Grover, all of which transfers appears in the Abstract of Title to the land that the respondents admitted in evidence, as evidence of their title, (defendant's exhibit 5) and by virtue of

those transfers A. I. Grover claimed ownership to the full 80 acres of land, without any knowledge or sanction of the heirs of Washington Pocatello, deceased; that on the 3rd day of December, 1919, one Charles E. Foxley, filed petition for appointment of himself as administrator of the estate of Washington Pocatello, deceased, the record showing that Chas. E. Foxley was selected by Judge Justin D. Call and recommended to those ignorant and uneducated Indians to represent them; this fact was pleaded in plaintiff's complaint paragraph 18, (trans. 0193, 0194); and is admitted by the respondents paragraph 18 of their answer (trans. 0213) and also found to be a fact by the trial court in its Finding No. 18, wherein the Court found as follows:

> "That Minnie Pocatello and four of her children appeared in Court on or about November the 1st, 1919 at the time the hearing on the Petition for Settlement of the Account and Distribution in the Estate of Yaotes Owa, deceased; that at said time Hon. Justin D. Call, then Judge of said Court, fully advised them of the nature of the probate proceedings then pending and the said Court then requested said Charles E. Foxley to consult with said Minnie Pocatello and the plaintiffs herein; that conferences were thereafter had between said parties and the plaintiffs herein, and their mother then signed a request in the matter of the estate of Washington Pocatello, deceased, for the Court to appoint Charles E. Foxley as administrator of said estate, the said request is attached to and made part of the petition for Letters of Adminis-

tration in the estate of said Washington Pocatello, deceased; that pursuant to said request and after due and legal notice said Charles E. Foxley was as heretofore found duly and regularly appointed as administrator of said estate and thereafter qualified and Letters of Administration were issued to him, and said Letters have never been revoked; that in the summer of 1921 Superintendent Donner called Minnie Pocatello and her two oldest daughters, plaintiffs herein, in his office and advised them that Charles E. Foxley reported he had about $995.00 belonging to the estate of Washington Pocatello and that after deducting attorney's fee and cost there was left about $490.00 for the heirs, the exact manner of acquiring said money being not explained to said parties; that said Superintendent Donner then advised said heirs that he did not approve of the settlement of said estate without knowing more about it and spoke something of having the matter investigated; that several months later the heirs were informed from the Superintendent's office that nothing further could be done in the matter; that at different times thereafter said heirs appealed to said Superintendent's office to make an investigation of the settlement, but they were always told that nothing could be done; that said heirs did nothing further in the said matter until the death of Minnie Pocatello when the heirs herein sought an investigation but received no encouragement from the Indian Agency and were told nothing could be done and said heirs took

no further action until the filing of the complaint herein";

That said Charles E. Foxley who Judge Justin D. Call had recommended to those ignorant Indians as one to represent them, was on the 15th day of January, 1920, duly appointed as administrator of the estate of Washington Pocatello, deceased, and took the oath of office and fully qualified as said administrator of the estate of Washington Pocatello, deceased; that said Charles E. Foxley as said administrator filed no inventory whatsoever in said estate with the District Court, but on the other hand he secured a certified copy of his Letters of Administration, of the Estate of Washington Pocatello, deceased, and filed the same with the First National Bank of Pocatello, Idaho, (See stipulation filed by respondents, at time of trial and accepted by the Court as part of the record in this case, trans. 0245); that the said Bank, sent to said administrator the sum of $995.00, of the $1,000.00, paid to the Bank by A. I. Grover for the Washington Pocatello and Minnie Pocatello Deed; that said Charles E. Foxley as administrator of the estate of Washington Pocatello, deceased, did on the 3rd day of March, 1921 file with the District Court of Box Elder County, Utah in the matter of the estate of Washington Pocatello, deceased, his Final Account, and Petition for Settlement and Distribution, thereof, and in said Final Account and Petition for Distribution, he reported as follows, to wit:

"that he received from the First National Bank of Pocatello, Idaho, from a Land Contract of sale

by deceased and wife, $995.00,

Under title, Brief description of property, he stated:

"The property described in the petition for letters of administration as an undivided one-third interest in the estate of Yaotes Owa, or one-third of the East ½ of Section 12, Tp. 11 N. R., 3 West, S. L. M. had been converted into cash by reason of a contract executed by Washington Pocatello and wife prior to the death of Washington Pocatello and placed in escrow and covering such interest as might be determined as belonging to said Washington Pocatello";

That the said final account contained a prayer that the account be allowed, proved and settled.

That the said final account was accomplished by a petition for distribution directed to the District Court of the First Judicial District of the State of Utah in/and for the County of Box Elder and said petition contained a prayer that the said administration of said estate may be brought to a close and that he may be discharged from his trust as such administrator; the said final account filed by Charles E. Foxley, stated positively that he only received $995.00 from the escrow depositor, for the Washington Pocatello Deed, and said administrator claimed one half of that amount, $497.00, for himself as attorney fee in the matter, and $7.00 costs, leaving $491.00 to distribute to the heirs; in this connection the Appellants again quote part of the Trial Court's Finding, No. 18, as follows:

> "that in the summer of 1921 that Superintendent Donner called Minnie Pocatello and her two oldest daughters, plaintiffs herein, in his office and advised them that Charles E. Foxley reported he had about $995.00 belonging to the estate of Washington Pocatello and that after deducting attorney's fee and costs there was left about $490.00 for the heirs, the exact manner of acquiring said money being not explained to said parties" (Finding No. 18, Trans. 0321).

that the District Court of Box Elder County, Utah, never at any time held any hearing or made any disposition of the Final account and Petition for Distribution, in the estate of Washington Pocatello, deceased, and the records show that the said estate has remained to this day without even an inventory or appraisement, and unsettled by said Court; the Probate Court record in the Matter of the Estate of Washington Pocatello, deceased, was admitted in evidence (Plaintiff's exhibit "M") which discloses that on the 3rd day of March, 1921, the Clerk of the said District Court made an Order fixing time for Final Distribution, in the Matter of the Estate of Washington Pocatello, deceased, for Monday, the 14th day of March, 1921, at ten o'clock A. M., and the Court Room at the County Courthouse as the place. And proper notices were sent out; the said probate record further discloses that no action was taken on the Matter, at the time set; that the probate record further shows that a written objection to the allowance of the account and the settlement of the estate on behalf of the heirs, dated March 14th, 1921, made by one B. C. Call as Attorney

for contestants, was filed in the said Matter on the 27th day of August, 1921, the probate record further shows that on the 12th day of September, 1921, Albert A. Law as Judge of said Court made an order of Continuance in said Matter to the 10th day of October, 1921; that on the 10th day of October, 1921, the said Judge Albert A. Law, made another Order of continuance of said Matter to the 14th day of November, 1921; that on the 14th day of November 1921, the said Judge Albert A. Law made another Order of Continuance of said Matter to the 12th day of December, 1921; that on the 12th day of December, 1921, one L. B. Wright, signing as Judge, made another Order of Continuance of said Matter to the 9th day of January, 1922; that on the 9th day of January, 1922, one Wm. W. McCrea, signing as Presiding Judge, made another Order continuing the said matter to the 13th day of February, 1922; that the probate record in the estate of Washington Pocatello, deceased, discloses that no action was taken, or any hearing had on the said matter on February the 13th, 1922, and the record discloses no further order or action by the Court in any manner whatsoever was taken in the Matter of the Estate of Washington Pocatello, deceased, by the District Court until this suit was filed; that during all the years from January the 9th, 1922, a matter of seventeen years, the District Court of the First Judicial District of the State of Utah in and for Box Elder County, failed, refused and neglected to do its duty, and give any protection to the heirs of the estate, and failed, refused and neglected to hold a hearing on the Final Account and Petition for Distribution in the Matter of the Estate of Washington Pocatello, deceased, but, that some-

time later, the exact time being unknown to the Appellants, the Administrator, George E. Foxley, left the Stat eof Utah for parts unknown, took with him, or to himself all of the $995.00, he received from the escrow holder, that A. I. Grover paid for the Washington Pocatello Deed, and the Probation of the Estate of Washington Pocatello, deceased, is today still on the Docket in the District Court of Box Elder County, Utah, unsettled and undisposed of; and the heirs of said estate have never received one cent of the estate; this suit was first filed by the heirs of Washington Pocatello, deceased, in their own name, and respondents came into court and demurred on the very ground that the record disclosed that an Administrator had been appointed in the Washington Pocatello Estate, and that the Estate had never been closed and therefore the heirs could not sue for or ask for an accounting of the rents and profits, that only the administrator could do that, the Court sustaining said demurrer a Special Administrator was appointed who joined the heirs in this suit; respondents answered the third amended complaint of Appellants and filed a further and separate answer (trans. 0229 to 0233), and prayed for affirmative relief, that the title to the undivided one-third interest be quieted in Amasa L. Clark and Joseph E. Robinson, who as alleged in the pleadings, purchased the entire 80 acres of Land from Albert I. Grover, and Hortense Grover, his wife, on the 28th day of March, 1925, paying $12,500.00 for the same. Appellants replied to the Further and Separate Answer of the respondents, and the respondents filed a supplemental answer at time of trial (trans. 0247), and on those issues the case was finally tried before the Hon-

orable Lewis Jones, District Judge of Box Elder County, Utah; Both documentary and oral evidence was admitted, including the full Probate Proceedings in said District Court in the Matter of the Estate of Washington Pocatello, deceased, and the Decrees of Distribution and other documents; Respondents placing in evidence the Abstract of Title they received from A. I. Grover (Def. Ex. 5), and briefs were filed and the case orally argued to the Court, and on the 23rd of October, 1939, Judge Lewis Jones made and filed his memorandum decision as follows to-wit:

> "The Court: In the case of Laura Morris, Special Administratrix, vs., Clark and Robinson, the Court directs the findings and decree be prepared in favor of the defendants and against the plaintiffs, for the reason the court is not convinced from the record here but what the full amount of the escrow had been paid by Saylor or Diteman, or some of the other parties in interest, and for the reason that it affirmatively appears that during the minority of these Indians an administrator was acting or supposed to be acting, in this jurisdiction, a fact which these Indians knew about for the reason that they went to the Superintendent at Fort Hall and requested certain things to be done; and it is my understanding that the statute of limitations will run against a minor during the time the personal representative is acting.
>
> "So far as the question of notice is concerned, the mere fact that Mr. Service made an affidavit showing the terms of the escrow can not be held

to mean anything in view of the fact that the very deed referred to in the escrow appears to have been subsequently recorded showing a consideration of $3,200.00. Nor does the affidavit of Grover, as shown in the abstract, give notice of any irregularity. So the findings may show that the defendants, were, in effect, innocent purchasers for value.

"Now in view of the fact that I did not fix a date for rendering a decision in this matter. I will ask the reporter to make a transcription of this decision, and counsel for the defendants is requested to prepare and present to this Court not later than November, the 27th, 1939, after notice to Counsel for plaintiff, proposed findings, conclusions and decree" (trans. 0312);

That the Court signed and filed thirty Findings of Fact, as prepared by Counsel for the respondents, (trans. 0315 to 0324), and Conclusion of Law, (trans. 0324) and a decree quieting title in defendants, Amasa L. Clark and Joseph E. Robinson, to the undivided one-third interest in said 80 acres of land that was decreed to the estate of Washington Pocatello, deceased, and dismissed plaintiff's both Causes of Action (trans. 0325 to 0326); Plaintiffs filed an exception to the said Findings of Fact, Conclusions of Law, and decree (trans. 0314); that on the 23rd day of February, 1940, that Appellants appealed the said Cause to the Supreme Court of the State of Utah, the same being the highest court in the State of Utah, the said appeal being taken on both questions of law and fact; it is admitted by

Appellants that their counsel failed to serve on defendants and file a proper Bill of Exceptions with the Trial Court within the time fixed by the Court to file the same; that Appellants petitioned the Trial Court for relief under Section 104-14-4. Revised Statutes of Utah, 1933, (trans. 0343, 0344) respondents objected to the Petition for Order of Relief, and objected to the Trial Court granting relief (trans. 0356, 0357); That the Trial Court after hearing said petition and objection in its discretion, made its findings of fact and conclusions of law, (trans. 0358, 0359) granting to Plaintiffs the relief prayed for, and made the following order:

> "ORDERS AND DECREES, that plaintiffs be and are hereby relieved from their default in not filing and serving a proposed Bill of Exceptions before the time for such filing had expired, and that permission is hereby granted to Counsel for Plaintiffs to forewith serve proposed Bill of Exceptions upon Counsel for Defendants and have same settled by the Court.
>
> Dated this 11th day of March, A. D. 1940.
>
> (s) LEWIS JONES, District Judge

That Plaintiffs immediately filed and served their proposed Bill of Exceptions on Counsel for Defendants, (trans. 1 to 55, Second Volume of Record) and the Trial Court, on a day appointed, settled the said bill of exceptions, by the following language:

> "The foregoing bill of exceptions contains all the testimonial evidence adduced on the trial of

this cause, and correctly contains the various proceedings during the trial as well as subsequent thereto, the same being true and correct, it is accordingly settled and allowed as a Bill of Exceptions in this cause.

Dated, Brigham City, Utah, April 15th, A. D. 1940."

(s) LEWIS JONES, District Judge

(Trans. 80, Vol. 2, Abstract of Record).

That the transcript on appeal (trans. 80, 2nd volume) containing the bill of exceptions was in due time lodged in the Supreme Court of the State of Utah; that subsequent to the appeal being lodged in the Supreme Court of the State of Utah, the respondents moved the Supreme Court to strike appellants Bill of Exceptions, on the ground that Appellants were not entitled to the relief granted by the Trial Court, and the said Supreme Court of Utah disregarding the United States Statute, Sec. 194, 25 U. S. C. A. and disregarding the facts that this is a case in equity, and disregarding the Statutes of Utah, and the many decisions of the Supreme Court of Utah, holding that in all cases of equity the Supreme Court must pass on the questions of fact as well as questions of law, as hereinlater cited, did, on the 17th day of July 1940, make an order striking Appellants Bill of Exception from the record; that respondents then moved the Supreme Court of Utah to dismiss Appellants appeal; that the said Court did on October 4th, 1940, deny the motion to dismiss the appeal and heard the case on the judgment roll only, and finally rendered the decision from which this appeal is taken to this

Court; the Supreme Court of Utah declined and refused to take judicial notice of the probate proceedings and record in the Matter of the estate of Washington Pocatello, deceased, which appellants contend is part of this cause, and the Supreme Court of Utah refused to recognize that the Final Account of the Administrator, in the estate of Washington Pocatello, deceased, where in the Administrator reported that only $1,000.00 was paid to the escrow holder for the Washington Pocatello deed was evidence that only that amount was paid, the said Court holding in paragraph 7 of said decision, as follows:

> "Despite the striking of their Bill of Exceptions, Appellants argue that such finding is not supported by the evidence. They contend that by the admissions in Defendant's pleadings, that Foxley, Administrator, had reported in the estate proceedings the receipt of only $1,000.00 from the depositary bank and that the affidavit of the cashier of such bank hereinbefore adverted to, setting forth the terms of the escrow was placed on record, plus the record of the probate proceedings in the Estate of Washington Pocatello—of which though contained in the stricken bill of exceptions, they contend we must nevertheless take judicial notice—it is conclusively shown that the escrow deed was delivered without performance of the condition. With this contention we can not agree. The report of the administrator was never heard or passed upon by the probate court. We can not say that it necessarily spoke the truth with respect to the amount received by the administrator from

> the bank, nor that the report established that the bank delivered to him the total amount paid by the grantee in the deed, especially since the stricken bill may contain evidence which precludes any inference whatever which might possibly be drawn therefrom:"

It was and is the fault of the District Court of Box Elder County, that the final account of the administrator Foxley, lie on the Docket of said District Court for full 17 years, without the court doing its duty to the heirs and, to the estate, by holding a hearing on said Final account, and thereby permitting the Administrator to take the $995.00 to himself, that at the trial of this case respondents never even attempted to refute, or offer any evidence that the report of the Administrator was wrong, or that the full amount had been paid, but on the other hand pleaded that they had no information or beliefs as to whether such allegations were true or not, and that now owing to the lapse of time, the respondents had no means to tell whether the allegations were true or false, and the trial court record discloses that the defendants at the trial never attepted to offer a scintilla of evidence that more than $1,000.00 was paid by A. I. Grover to the escrow holder for the Washington Pocatello deed. The report of the administrator of Washington Pocatello, estate is strong prima facia evidence, and enough to put the burden on the respondents under Sec. 194, 25 U. S. A. C. to prove that the full amount was paid to the bank before the deed was delivered and furthermore, it was sufficient evidence under the general rule of evidence, in actions to quiet title, wherein the

defendants come in and ask the title to be quieted in them, and especially where it is known to the world that the deed the defendants claim under was placed in escrow, not to be delivered until the full performance of all conditions of the escrow, and it is pleaded that the conditions of the escrow agreement were not fully performed.

Appellants contend that there is at least four Federal questions involved in this action, as set forth in their petition and statement of Jurisdiction that accompanies the petition of appeal to this Court and Appellants will try and present all those questions in this brief as pointedly and briefly as possible.

First:

In the first and second paragraph of their motion to dismiss and also in the first and second paragraph of their grounds against the jurisdiction of the Supreme Court of the United States Respondents allege:

> "1. That the record affirmatively shows that no federal question is involved in this action.
>
> 2. That no federal statute or treaty is involved and the State Court has made no judgment nor has there been any holding as to a federal statute or treaty."

The Respondents in reviewing the matters set forth by the Appellants in their first order, say as follows:

> "Appellants first contention is that the District

Court wrongfully placed upon the appellants the burden of proving compliance with the terms of the escrow agreement. They base this contention upon 25 U. S. C. A., Sec. 194, which provides:

> 'In all trials about the right of property in which an Indian may be a party on one side and a White person on the other, the burden of proof shall rest upon the White person whenever the Indian shall make out a presumption of title in himself from the fact of previous possession of ownership.'

And then Respondents go on to say:

> "This statute has two possible interpretations, one is that it places the burden of going forward with the evidence upon the White person, the other is that it places the burden of pursuasion upon the White person.
>
> "If it is construed as dealing with the burden of going forward with the evidence, respondents affirmatively satisfied this burden. Respondents showed, as the lower court expressly found that they claimed under a deed which had been properly recorded. By this showing the presumption arose that the conditions of the Escrow were fully complied with." (Citing two cases which we will deal with later.)

In paragraph 2 of their Motion, and paragraph 2 of their Statement, Respondents emphatically declared that no Federal Statute is involved and the first

order of their argument, they recognize and quote a federal statute, and proceed to place a strained interpretation upon said statute to favor respondents, thereby to try to get away from the Statute. If no Federal Statute is involved, then why do respondents try to impress upon this High Court their interpretation of a Federal Statute in their favor? Appellants contend that the Respondents, by their analysis of this statute have clearly established a Federal question in this case, that it is within the jurisdiction of this Court to decide, even if Appellants did not discuss the Statute further. However, Appellants beg the permission of this Court to further discuss this Statute, as it appears that this Court has not had to construe this statute before, at least Appellants are unable to find a case where this Court had this particular Statute before it.

The history of this Statute is that it was enacted by the Congress of the United States some 107 years ago, and is in full force and effect today. It is very evident from the wording of the Statute, which is very clear and unambiguous in its language that it was enacted by the Congress of the United States for the protection of Indians, and Appellants do not hesitate to say, that it is only subject to one interpretation, and not by any means subject to the strained double interpretations attempted to be placed thereon by Respondents in their favor. The meaning of the language of the Statute is clear, and is only subject to one interpretation, and that is, that in all trials about the right of property between an Indian and a White person, when the Indian makes out a presumption of title in himself, the White person must prove his title to be superior to the Indian's title, and as heretofore said was en-

acted for the protection of Indians all over the United States. And the protection of that Statute follows the Indian in all Courts, and the Supreme Court of the United States is the Court of last resort to determine whether or not the Indian was granted or denied that protection at the trial of the cause and the immunity and privilege guaranteed him by the Statute. And it is immaterial before this Court, whether the Bill of Exceptions was stricken by the Supreme Court of a State, and such Court refused to examine the evidence produced at the time of trial. This Honorable Court, in order to determine whether that protection, privilege and immunity was given to the Indian at the time of trial, has jurisdiction to order the whole record up for this Court's examination to determine the question. In the cause at bar it is admitted and conceded that the Appellants, the heirs of Washington Pocatella, deceased, and Minnie Pocatello, his wife, are and at all times were full blooded Indians, non-residents of the State of Utah, living on the Fort Hall Indian Reservation in Idaho, under Indian tribal relations, and wards of the Government, and that by the law of decent and distribution of the State of Utah, they inherited from their ancestor a valuable property right in the State of Utah. That this inheritance was decreed to them by a solemn decree of the District Court of the First Judicial District of the State of Utah, which created the highest muniment of title in these Indian heirs that it is possible to possess, and when the said District Court failed, refused and neglected for seventeen years to settle their estate, and they were compelled to finally file a suit in said Court to try and recover the property that rightfully belongs to them,

under and by virtue of the Act of Congress, June 30, 1834, Sec. 22 of Act; 161, Sec. 22, 4 Stat. 733, R. S. Sec. 2126; Sec. 194, U. S. A. C. Vol. 25, the Supreme Court of the United States has the final say as to whether those Indians were afforded or denied that protection in the State Courts.

Respondents in support of their contention that there is no Federal question involved, and in support of their interpretation of this United States Statute, cite two cases, which have no bearing on the question whatsoever, and why respondents should cite the case from Minnesota, namely, Merchants & Farmers State Bank by Peyton v. Olson, 189 Minn. 528; 250 N. W. 366, 89 A. L. R. 1289 is beyond Appellant's understanding, that case is so much stronger for the Appellants in the case at bar, that we pray the indulgence of this Court to quote from the decision:

> "1. Where an instrument placed in escrow is delivered by the escrow holder either in violation of, or without compliance with, the terms or conditions of the escrow agreement, no title passes by virtue of such delivery, because in legal contemplation it is no effectual delivery and the grantee thereunder obtains no more right than he would have in possession of a forged or stolen instrument. Henry v. Hutchins, 146, Minn. 381, 178 N. W. 807, Bergstrom v. Picket, 148 Minn. 224, 181 N. W. 343; Knap v. Nelson, 41 Colo. 447, 92 Pac. 912; Evans v. McKinney, 308 Ill. 100, 139 N. E. 106. The obtaining of the delivery of the deed held in escrow by any means short of performance of

the conditions of the escrow is against the assent of the grantor, and since this assent is essential to the delivery and the delivery essential to the validity of the deed, no title passes. Everts v. Agnes, 4 Wis. 343, 65 Am. Dec. 314, 318; Daget v. Daget, 143 Mass. 516, 10 N. E. 311; Calhoun County v. American Emigrant Co., 93 U. S. 124, 23 L. Ed. 826; Los Angeles High School Dist. v. Quinn, 195 Cal. 377, 234 Pac. 313; Weghorst v. Clark, 66 Colo. 535, 180 Pac. 742; Coe v. Turner, 5 Conn. 86; Evans v. McKinney, 308 Ill. 100, 139 N. E. 99. If no title passes to the grantee named in the deed, then, of course, he can pass nothing on to an innocent subvendee. Balfour v. Hopkins, 93 F 564, 35 C. C. A. 445; Fearing v. Clark, 16 Gray (Mass.) 74, 76, 77 Am. Dec. 394; Provident Life & Trust Co. v. Mercer County, 170 U. S. 593, 604, 18 S. Ct. 788, 42 L. Ed. 1156; Devlin on Deeds (3rd Ed.) Sec. 322. In so far as Murray v. Foskert, 114 Minn. 44, 130 N. W. 14, indicates a different rule, it is hereby overruled.

2. & 3. Omitted.

"4. It is true that a grantor whose deed has been wrongfully delivered may under some circumstances be estoped as against his grantee or subvendee from setting up the wrongful delivery of the deed . . . . . ."

Respondents again on page 2 of their statement, attempt to put a construction on Sec. 194, 25 U. S. C. A., as follows:

> "If it is construed as dealing with the burden of going forward with evidence, respondent affirmatively satisfied this burden. Respondent, shows, as the lower Court expressly found, that they claimed under a deed which had been properly recorded. By this showing the presumption arose that conditions of the escrow were fully complied with."

That is not the law, where it is shown that a deed was placed in Escrow, and it is alleged that it was wrongfully delivered, the same as if it were stolen or forged, there is no presumptions of a valid delivery, and the above case from Minnesota cited by the respondents expressly holds to the contrary. It is true the Minnesota Court did say as follows:

> "It follows if Melford can prove what he proposes to prove, the deed was wrongfully delivered and carries no title, and if there are no superior equities on the side of the bank which estop Melford from establishing the wrongful delivery and consequent non passage of title."

But the case before the Minnesota Court was not an action to quiet title, where in it was admitted that the deed Respondents are claiming under was placed in escrow not to be delivered until certain conditions were fully performed, and the conditions were never performed and it was not a case where Respondents came in and pleaded ownership through a deed that they admitted was placed in escrow, not to be delivered until certain conditions were performed, nor where the escrow deposit was published to the world,

and Respondents pleaded ignorance of whether the conditions were performed or not, but relied upon the contention that because the deed was filed of record and it recited a consideration of $3200.00, that thereby the Respondents were innocent purchasers for value and it must be presumed that there was a valid delivery, and pleaded as was done in the case at bar for affirmative relief, that the Court quiet title in respondents to the said undivided one-third interest. So the Minnesota case does not apply at all, because that Court said, in paragraph 7 of its decision,

> "This is an action to determine adverse claims, and the relief sought does not include possession."

The other case cited by Respondents, namely Swain v. McMillian, 31 Mont. 433, 76 Pac. 943, 946, is not by any means a case identical with the case at bar, the quotation taken by Respondent from the case as appears on page 3 of Respondents statement as follows:

> "When one appears of record to be the owner in fee of real estate, another alleging the contrary must show the fact by clear and convincing proof."

is not in point in the case at bar. In the Montana case, the Plaintiff who made the deed and was claiming the property was not an Indian, and he was not dead at the time of delivery, and Defendants pleaded he had knowledge of the delivery. On this point the Court held:

> "The gist of the foregoing is that Plaintiff made a deed, and placed it in escrow, to be delivered in

six months upon the performance of certain conditions. He alleges these conditions were never performed. Defendant alleges that they were. Plaintiff alleges that thereafter, and by some means unknown to him, the Defendant became possessed of the deed, paying or rendering no consideration therefor. The Defendant alleges that plaintiff was paid the entire consideration for the deed, and that it was delivered in accordance with the escrow agreement, and by and with the consent of the Plaintiff. All of these were material allegations on the part of plaintiff, and all were denied. The burden was upon the Plaintiff to prove them and this he failed to do."

How is that case an authority that the Supreme Court of the United States under Section 194, 25 U. S. A. C. has no jurisdiction to hear this case. Respondents then on Page 3 of his statement goes on to say:

"Thus even though the ultimate burden of going forward with the evidence was placed on the Appellants, such a placing of the burden would be correct in spite of the Statute providing the burden should be on the White person, for, although the burden was originally on the Respondents, this burden shifted to the Appellants when the Respondents entered evidence from which the presumption arose that the conditions were complied with. The Lower Court found that Appellant offered no evidence to rebut this presumption so a Finding against the Appellants was justified."

In that argument, Respondents, or more properly, Counsel for Respondents, is putting his own wrongful construction in favor of his clients, White persons, upon a Statute of the United States, that was enacted for the sole purpose of protecting Indians from being robbed of their property in the manner and way they were robbed in the case at bar, and in the same breath saying to the Supreme Court of the United States there is no Federal question, and no Federal Statute involved, and further Appellants allege the case at bar conclusively shows the Appellants furnish positive evidence that A. I. Grover only paid $1,000.00 for the deed, when the report of the Administrator in the estate of Washington Pocatello, deceased, was admitted in evidence.

Again Respondents say:

> "If, on the other hand, the statute be construed to deal with pursuasion rather than the burden of going forward with the evidence, error can not be shown that would involve a weighing of the evidence as there is no evidence to be reviewed by this Honorable Court since the Appellant's Bill of Exceptions has been stricken."

If the protection for Indians enacted by the Congress of the United States, in Section 194, 25 U. S. C. A. does not follow the Indian litigant to all Courts, and especially to the Supreme Court of the United States, which Honorable Court has the final say in interpreting and construing all U. S. Statutes, then the law is a dead letter. If it can be done, as was done in the case at Bar, despite the Trial Court in its discretion, grant-

ing relief to the Indian, and permitting a Bill of Exceptions to be served and filed, and the said Court settling such Bill of Exceptions, then when it reaches the Supreme Court of the State if the Respondent can come in and move the Supreme Court to strike the Bill of Exceptions, and thereby circumvent that Statute and thereby prevent the Supreme Court of the United States from reviewing the evidence in the case, then the statute is a dead letter.

This is a case in equity, before this Honorable Court, just the same as it was a case in equity before the Trial Court, and the Supreme Court of Utah, and when respondent moves this Honorable Court to dismiss the appeal, they have to do it with clean hands, they can not profit by their own acts. The United States Statute in question, does not deal in presumptions for the White persons, and an Appellat Court has no right to presume just from the Findings of the Trial Court that the White person assumed the burden and proved his title, without reviewing the evidence.

Respondents on page 4 of their statement, in concluding their contention that under this U. S. Statute there is no Federal question they say:

> "Appellants made no assignment of error as to the burden of proof so the entire question argued above is not even before the Appellant Court."

Appellant is at a loss to know what Respondent means by that assertion. If they mean, No Assignment of Error as to burden of proof is made to this Honor-

able Appellate Court, we call attention to Appellant's first assignment of error, if that is not an Assignment of Error as to burden of proof specifically under the U. S. Statute in question, then no such Assignment of Error can be made.

If Respondents mean that no Assignment of Error was made to the Appellate Court of the State of Utah, we call the Court's attention to Appellant's 6th Assignment of Error, before the Supreme Court of the State of Utah, which in part reads as follows:

> "The Plaintiffs proved the escrow agreement, and that the deed was placed in escrow, and it is so found by the Court in its findings of facts. Findings Nos., 3 and 6 (Abstract 113-114), and it is a settled rule of law that when it is proven that an instrument was placed in escrow, then the burden is on the party claiming under the instrument to prove that all the obligations of the escrow agreement were fully performed before the instrument was delivered. Further, the Plaintiffs being Indians, the burden of proof shifted to the Defendants, they being White persons under the laws of the United States of America. By the Act of June 30th, 1834, which provides as follows:"
>
> '(and Appellants set out verbatim the United States Statute in their Assignment of Error and then Continued)'
>
> "In this case the Court found that title of the land was in Washington Pocatello, and his heirs, Findings Nos. 6 and 8, (Abstract 114-118), con-

> sequently the burden of proof was upon the Defendants to prove the deed was not wrongfully delivered."

How can Respondents say now that no Assignment of Error was made on the burden of proof.

Appellants also in their reply brief to the Supreme Court of Utah cited and argued the burden of proof and quoted the United States Statute, on page 27 of Appellant's printed reply brief in the Supreme Court of Utah, said:

> "In conclusion, Appellants summarize the Facts disclosed by the Judgment Roll, imposed upon the Respondents four different and distinct burdents, none of which Respondents even attempted to meet.
>
> "First: It being admitted that the Plaintiffs were and are full-blooded Indians, and Wards of the Government, and it was shown that they were not only the presumed owners of the undivided one-third interest in the land, but the legal owners, the burden is placed upon the white man that claims that property to prove good title to it, and we quote the United States Statute on that point."
>
> (And then Appellant set out verbatim the said United States Statute).

Appellants briefed this question to the Trial Court, and argued it to the Trial Court, and also argued it to the Supreme Court of Utah.

The policy evidenced by the said Statute is expressed in an opinion of the U. S. Attorney General, wherein he said:

> "This section is evidence of the Policy of the Government to give Indians the benefit of the doubt on questions of fact or construction of treaties or Statutes to their welfare." 34 Op. Atty. Gen., P. 439 (1925).

In all sincerity Appellants ask this Honorable Court, is it not the jurisdiction of this Court to construe and define the policy of the Government in enacting any of its Statutes of the United States?

Second:

Appellants as a second Federal question contend that Washington Pocatello, and Minnie Pocatello, being Indians, wards of the Government, and incompetent, which means nothing more than they are wards of the Government, not having received a certificate of competency from the Government, which was proven at the trial, was the case of Washington Pocatello, and Minnie Pocatello, his wife, by Fred A. Gross, Superintendent of the Fort Hall Indian Reservation, who testified to the Court from the record of enrollment of Indians on the Fort Hall Indian Reservation in Idaho, that Washington Pocatello and Minnie Pocatello were regularly enrolled as Shoshonie Indians, and that the record showed that neither one of them had received a certificate of competency from the Government (Pages 11 and 12 transcript of testimony).

Appellants concede that the question of whether Washington Pocatello and Minnie Pocatello had the power to execute a valid deed in the first place is not the paramount question in the case at bar. The cardinal fundamental principles of law pertaining to constitutional rights of heirs inheriting property, guaranteed by the Constitution of the United States, and of every State in the Union, has been so ruthlessly disregarded and trampled under foot, in stealing a valuable inheritance from these Appellants, non-residents of the State of Utah, and giving it to residents of the State of Utah, in the case at bar, that even if they were White persons they would have a right to appeal to this Honorable Court, from the decisions of the Courts of the State of Utah which question will be considered later in this brief. However, the Appellants being Indians, they contend that under the following Statutes of the United States, that Washington Pocatello had no capacity to execute a deed in the first place, and that when Washington Pocatello died shortly after executing the deed and long before the inheritance was decreed to his estate, that his deed executed and placed in escrow was invalid, and in that respect we quote the following United States Statutes:

> "Act of Congress, March 3rd, 1871, c 120, Sec. 3, 16 Statute at Large, 570. U. S. Code, Compact ed. Sec. 81, 25 U. S. C. A. Sec. 81."

The following are some decisions rendered on this Statute, while no one of the cases includes the sale of an inherited homestead of an ancestor, which is contended by Respondents, that this being a homestead

from the Government to Yaotes Owa, the ancestor, that although the heirs were incompetent wards of the Government, that Washington Pocatello and Minnie Pocatello had capacity to deed away such a valuable right, notwithstanding they could not legally enter into other and more minor contracts, for the reason that the patent to the ancestor was only subject to a five year restriction against alienation which had long since expired. If that is the law, it is certainly a strange doctrine. We cite a few cases construing these statutes:

> "Object of Statute:—This section is enacted for the protection of Indians while under the protection of the Government and living upon their reservation."
>
> Whirlwind v Von der Ahe, (1896) 67 Mo. App. 628.
>
> "Duty of United States with respect to Indians: —This section and sections 82 and 83 of this title, are only intended to protect the Indians from improvient contracts, and do not create any legal obligation on the part of the United States to see that Indians perform their part of the contracts."
>
> In re Sanborn (Ct Cl. 1893) 13 S. Ct. 577, 579, 148 U. S. 222, 37 L. Ed. 429.

The land involved in the Washington Pocatello Deed was inherited land, and Appellants contend is governed by the following Act of Congress:

> Act of Congress, May 27th, 1902, c 88, Sec. 7,

32 Stat. 275; U. S. Code Compact Ed. Sec. 379, 25 U. S. C. A. Sec. 379: Which reads as follows:

> "The adult heirs of a deceased Indian to whom a trust of other patents containing restrictions upon alienation has been or shall be issued for lands allotted to him, may sell and convey the lands inherited from such decedent, but in case of minor heirs their interest shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon the petition filed by the Guardian, **but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved, shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee.**"

This Honorable Court has held in a former decision, opinion delivered Mr. Justice Clarke as follows:

> "Congress provided, in May 27, 1902 (32 Stat. at L. 245, 275, Chap. 888, Comp. Stat. Sec. 4223, 3 Fed. Stat. Anno., 2d ed. P. 846), that adult heirs of a deceased Indian might sell and convey full title to inherited lands, free from restrictions, but only by conveyances approved by the Secretary of the Interior; and that the interest of minor heirs might also be so sold and conveyed upon petition of a guardian, on order of a proper court, and when the sale was approved by the Secretary of the Interior. Under this Statute the land in controversy was sold in the public manner required by the rules of the Department of the Interior,

and for the purpose of this decision, all required action is assumed to have been, in form, properly taken."

Bluejacket v Ewert (C. C. A. Okl. 1920) 265 F 823, modified (1922) 42 S. Ct. 442. 259 U. S. 129, 66L Ed. 858.

Appellants contend the above decision establishes the fact that Washington Pocatello, and Minnie Pocatello, could not give a valid deed in the first instance. And the burden of proof was on the Respondents to show that the deed was valid.

Congress went further in protection of non-competent Indians, and at the same time to enable them to sell their interests, and in 1907 passed the following Act:

Act of Congress, March 1, 1907, c 2285, 34 Stat. at L. 1018. U. S. Code Compact Ed. Sec. 405. "5 U. S. A. C. 405 (providing as follows):

"Any non-competent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under any law of treaty, or who may have an interest in any allotment by inheritance, may sell or convey all or any part of such allotment or such inherited interest on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so disposing of his land or his interest under the supervision of the Commis-

> sioner of Indian Affairs; and any conveyance made hereunder and approved by the Secretary of the Interior shall convey full title to the land or interest so sold, the same as if fee simple title had been issued to the allottee."

Respondents contend and the Supreme Court of the State of Utah in their decisions in this case have held that Washington Pocatello and Minnie Pocatello, in executing this deed did not come under any of the foregoing Laws of the United States, for the reason that the land in question was patented to the ancestor as a homestead and was not an allottment. The Supreme Court of Utah disposing of Appellant's contention as follows:

> "Appellants question whether Washington and Minnie Pocatello, being Indian wards of the Government, could enter into a valid contract and execute a conveyance. They concede that the period during which, under congressional enactment there were restrictions upon alienation, had long since passed at the time of transaction. As far as revealed by the Judgment roll and other conditions prescribed by law, requisit to a valid contract by such Indians, may have been—if at all applicable—complied with." (Page 109—Petition for Appeal).

What Appellants conceded was that the five year restriction in the patent had expired.

Under Sec. 194, U. S. C. A. and by reason of the fact that this was an action to quiet title and an action

in equity, the duty was upon the Supreme Court of Utah, to examine the evidence and see whether Respondents had proven their title.

Respondents on page 6 of their statement asserted as follows:

> "the wording of the Statutes indicate that the approval of the Secretary refers only to a conveyance in violation of the restrictions, and the restrictions in the deed in the case had expired."

Appellants contend that the wording of all the U. S. Statutes heretofore quoted and relied upon convey the opposite indication, and the wording indicates that they refer to the present living Indians living under restrictions, and classed as non-competent Indians, wards of the Government, and do not apply only to the ancestor named in the original patent from the Government.

In a decision of the Federal Court of the State of Idaho, rendered 1917, the Court defined the word non-competent as applied to Indians as follows:

> "The view seems to be unavoidable that Congress intended to use the term 'non-competent' as descriptive of an Indian holding only a trust patent or other patent containing restrictions against alienation, or, what is perhaps the equivalent, an Indian to whom, even though he may be actually competent, a certificate of competency has not been issued by the Secretary of the Interior, and therefore the description 'non-competent' Indian

is inclusive of all Indians who are without full power to alienate their property."

U. S. v. Nez Perce County (D. C. Idaho, 1917) 267 F. 495.

To Appellants it does not make sense, that a white man could not go on the Fort Hall Indian Reservation and make a binding contract with Washington Pocatello and Minnie Pocatello, for sale of personal property, labor, rental or leases that would be enforceable in any Court, unless they had proceeded under the terms of the Act of Congress, March 3, 1871, now Sec. 81, U. S. A. C. But in this case Albert Saylor could go on the Reservation, and get a deed from Washington Pocatello, and Minnie Pocatello, for 80 acres of land worth fully $15,000.00 for $3,200.00, and that the deed would be valid. The Act of any incompetent White person is not valid, and if the White person has a Guardian appointed over him, no matter how incompetent he may be, he could not give a valid deed without the approval of the Guardian.

Appellants again cite the same cases, that are cited in their statement of Jurisdiction as follows:

"Restricted Indians cannot transfer property prior to the termination of their restrictions.

"The Plaintiffs undertake to avoid this inescapable conclusion from the authorities, by claiming that restricted Indians cannot by any devise transfer property prior to the termination of their restriction. **This is Settled Law.**

Staley vs. Es Penlaub et al 36 Fed 2d, 81.

To the same effect are the following decisions:

Goodman vs Buffalo (8 C. C. A.); 162 Fed. 817.

Beck v. Floumoy, 65 Fed. 30.

Sheldon v. Dunbar, 40 Kan. 346; 19 Pac. 901.

Wiggins v. Connelley, 163 U. S. 56; 16 Sup. Ct. 914; 41 L. Ed. 69.

Whether Washington Pocatello and Minnie Pocatello could give a valid deed in the first instance, that could be used subsequent to the death of Washington Pocatello, to steal their inheritance from the Appellants Indians is a federal question that this Honorable Court has jurisdiction to decide.

Third: The two foregoing questions are not the only Federal questions in this case that give this Court jurisdiction to hear and decide the case at bar; Appellants allege that the State of Utah, through the State Courts of the State of Utah, has by the decisions in this case deprived the appellants of a valuable property right, by taking said valuable property right away from those Appellants, Indians, Citizens of the United States, non-residents of the State of Utah, without any consideration or remuneration whatsoever, and without due process of law, and given the said valuable property right to residents of the State of Utah. That the State of Utah through the Courts of the State of Utah has denied these Appellants brought within its jurisdiction by White persons for the purpose of depriving those Appellants of a valuable property right,

the equal protection of the laws of the State of Utah and the laws of the United States in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and has permitted the citizens of the State of Utah to the same as steal from Appellants a valuable property right inherited from their Ancestors, and given it to White persons, citizens of the State of Utah; that the pleadings, evidence and record in this case establishes clear and unequivicably, the following facts:

That the United States of America on May the 31st, 1884, patented the said 80 acres of land involved in this suit, to an Indian woman of the name of Yaotes Owa, widow of Pooe Owa, that the said patent was filed of record in Box Elder County March 26, 1887, the record further shows that the patentee died in the late eighties; no petition for administration of the estate was instituted during all the years until 1917; that some years previous to 1917, about 65 acres of the said 80 acres was placed in good state of cultivation through some system inaugurated in that community, that the Appellants and their parents had no knowledge and were not a party to, they being ignorant of what interest if any they had in this land. The evidence showing that by the year 1917, that this 80 acres of land had become very valuable; that a White person, by the name of Albert Saylor, set out to try and obtain title to this 80 acres of land for one U. F. Diteman, and came to the conclusion that Washington Pocatello, an Indian living on the Fort Hall Indian Reservation, was the sole heir of Yaotes Owa, deceased, and on the 2nd day of February, 1919, sec-

ured a warranty deed from the said Washington Pocatello and his wife Minnie Pocatello for the consideration of $3200.00, paying only $200.00 cash, and on the 2nd day of February, 1917, placed said deed in escrow in the First National Bank of Pocatello, Idaho, all of which facts surrounding said -escrow deposited as heretofore stated were filed of record in Box Elder County, Utah. Naturally, the estate of Yaotes Owa had to be probated, through the District Court of Box Elder County, Utah, there being no probate court in the State of Utah. All estates are administered by the District Court. Respondents attempt to say that Appellants came into the Courts of Utah, and therefore they have to accept whatever treatment is handed out to them by the Courts of Utah; Appellant's Father did not voluntarily come into the State of Utah, or the Courts of the State of Utah, he was brought into the Courts of Utah, by the White persons who desired to get possession of his valuable inheritance for a paltry sum and the District Court of the First Judicial District of the State of Utah in and for Box Elder County readily assumed jurisdiction of his property, and exercised that jurisdiction and administration of that property just long enough to permit the White persons, citizens of the State of Utah, to the same as steal his inheritance which had by his death descended to his heirs. And then the District Court above named would not even attempt to settle his estate. Said District Court would not hold a hearing on the petition of the administrator, the man who the Court selected for, and recommended to, those ignorant heirs of Washington Pocatello, deceased, as a proper person to represent them, and then after seventeen years trying

to find out what became of their inheritance, they do finally come into this same Court, to try and recover their inheritance, the same Court writes its Finding, Nos. 17 and 18, and tells them that an Administrator was appointed by the Court, and that they knew that an Administrator was appointed because they had made inquiry at different times to the Superintendent of the Reservation, and that because such Administrator was appointed and was acting, or supposed to be acting, that they were now barred by the Statute of Limitations, notwithstanding that the same Court never had the Administrator even file an inventory in the estate, and refused and neglected to even hold the hearing that the Administratr asked for, but let it lie on the docket and permitted the Administrator to leave the State of Utah and take with him or to himself, the paltry sum that A. I. Grover paid to the escrow holder for the deed he filed of record. And the said Court now says because the deed was filed of record showing a consideration of $3,200.00, and the Court was not satisfied from the evidence the Plaintiffs produced—including the report of the Administrator, the Court's own officer—the Court was going to hold that the full amount of the escrow agreement was paid and that the deed was validly delivered. And in order to make title for the White persons, citizens of the State of Utah, against those ignorant Indians, non-residents of the State of Utah, the Court adopts the fiction of relation back to the time the deed was placed in escrow to circumvent the Statute of the State of Utah, Section 6405 Civil Laws of the State of Utah, 1917, which at present is Sec. 101-4-2 Revised Statutes of Utah, 1933, which provides:

"Property of Intestate Passes to Heirs subject to probate proceedings.

"The property, both real and personal, of one who dies without disposing of it by will passes to the heirs of the intestate, subject to the control of the Court, and to the possession of any Administrator appointed by the Court for the purpose of administration." (C. L. 17, Sec. 6405).

The moment that Washington Pocatello died, whatever interest he had in that 80 acres of land immediately vested in his heirs. The decrees in the estate of Yaotes Owa, and Jane and James Brown decree the property to the estate of Washington Pocatello, deceased. It was not decreed to Washington Pocatello individually as it was known to all concerned that Washington Pocatello was dead. The foregoing is no exaggerated statement, the record in the case is so clear and plain that all who run may read. Yet Respondents say in the last sentence of the second paragraph on page five of their statement:

"Appellants had a fair trial in the lower court and have not been deprived of their constitutional rights."

There is no question, this Court has jurisdiction to examine the record and see whether the Appellants have or have not been denied a constitutional right and had a fair trial. This land was patented to their ancestor, and whether they came in to the District Court of Box Elder County, Utah, to have that land decreed, or whether they were brought in, they had the con-

stitutional right that the Court would properly administer the estate. Such is the very highest judicial duty and obligation of a Court:

The Supreme Court of Nebraska recently has held as follows:

> "There is no higher nor more solemn obligation of the Courts than to see to it that estates which undergo administration are carefully guarded and preserved especially where the interest of minor heirs are effected."

In re Love Estate (Neb.) 286 N. W. 38 (6-19-39).

The District Court files and proceedings in the estate of Washington Pocatello, deceased, Probate File No. 355, are a part of this case, and the courts were bound to take judicial notice of the entire file and proceedings at the hearing in this case. In the case at Bar, at the time of trial in the lower Court the whole record in the estate of Washington Pocatello, deceased, was placed in evidence in this case, the following is taken from the record at the time of trial:

> Mr. LOWE: No objection to the introduction of the whole record.
>
> THE COURT: Probate File No. 355, the Estate of Washington Pocatello, the files are all received in evidence.

As Appellants has stated before, we repeat again, that probate file in the Washington Pocatello estate, contained the Final Account of the Administrator

Charles E. Foxley, which set forth his account with the estate as follows:

> CASH ACCOUNT: Of Whom Received.
>
> Answer: First Nat'l Bank of Pocatello, Idaho.
>
> On or For What: Land Contract of Sale by deceased and wife. Dollars $995.00.
>
> On the next page under the head: GENERAL ACCOUNT, appeared the following:
>
> "Set Forth: A brief description of the property belonging to said Estate and within the jurisdiction of said Court, that has come to the possession or knowledge of petitioner (moneys excepted) the appraised value of said property; whether the said property still belongs to said Estate, and if not, how the same was disposed of."

In answer to that demand in the General Account, Charles E. Foxley as Administrator on the same page gives the following description and report of the property:

> "The property described in the petition for letters an undivided one third interest in the estate of Yaotes Owa, or one third of the East ½ of S. E. ¼ of Section 12. Tp. 11 N. R. 3 West S. L. M. had been converted into cash by reason of a contract executed by Washington Pocatello and placed in escrow and covering such interest as might be determined as belonging to said Washington Pocatello."

The next item of the said account is as follows:

"(b) Show all expenditures during the period of time mentioned, of moneys belonging to said estate."

In that item the administrator listed the following:

"To Whom Paid: To Charles E. Foxley; On or For What:

Att'y Fee representing heirs in obtaining determination of heirs and by which said property came to the estate, after new-trial-having been decreed to others on first trial $497.00
Filing Pet Adm. 2.00
Notice to Creditors 5.00

504.00

Therefore petitioner prays that this account be allowed, approved and settled. Dated March 3rd, 1921.

Charles E. Foxley, Petitioner.

The said final account was verified as follows:

STATE OF UTAH)
) ss.
County of Box Elder)

Chas. E. Foxley, being first duly sworn deposes and says: I am the Administrator of the estate of Washington Pocatello, deceased. The foregoing account for the period above mentioned of my administration of the said estate, is in all respects just and true and according to the best of my

knowledge, information and belief, contains a full, true and particular account of the said estate for and during the said period of time, and of all sums of money belonging to said estate which have come into my hands as such Administrator, or which has been received by any other person by my order or authority for my use, and I do not know of error or ommission in the said account to the prejudice of any person interested in said estate. I further swear that the items of expenditure not exceeding twenty dollars, for which no vouchers are produced have been actually paid and disbursed by me, at the date when, the place where, and to the persons respectively to whom the said payments are stated in said account to have been made; and that the said account exhibits not only the debts that have been paid, but also a statement of all of which have been duly presented and allowed against the said estate, and of all claims against the said estate which have been presented and rejected, during the period embraced in said account.

Charles E. Foxley.

Subscribed and sworn to before me this third day of March, A. D. 1921.

LeRoy B. Young, Notary Public.

My Commission expires Aug. 24, 1921.

Notary Seal.

Here is a sworn record in the files of the Court of

Washington Pocatello, deceased, a record in this case, and also admitted in evidence in this case, that the Court holds is not evidence that only $1,000 was paid for the Washington Pocatello deed. And one of the reasons given is that the account was never settled and allowed.

As before stated the record in said estate and in said file shows that the Clerk of the Court set Monday the 14th day of March, 1921, at the County Court House, in the Court Room of said Court, in Brigham City, Box Elder County, Utah, as the time and place for hearing said account, and sent out legal notices to that effect; that no hearing was held on the date set, and the record shows that a verified objection dated 14th day of March, 1921, was filed in said court in said estate on August 27th, 1921, to the settlement of said account, said objections are as follows:

"1. That no Inventory has been filed in said Court.

"2. That item of $497.00 as attorney's fee which the said Charles E. Foxley is claiming is unreasonable and excessive, and the closing of said estate has been unreasonably delayed.

"3. That said item of $497.00 is not a proper and legal charge, and no interest has been accounted for since money has been in hands of the Administrator.

"Wherefore; contestant prays that the said account be not allowed, approved or settled as the same is rendered.

"Objectors prays for such other and further order that is just.

B. C. Call, Attorney for Contestants."

The said District Court record in the Probate Matter in said estate shows that Judge Albert A. Law on Sept. 12, 1921, made an order setting said matter for hearing for 10 a. m. on the 10th day of October, 1921, and as heretofore stated in this brief that the said Judge and his successors kept continuing the date for said hearing from month to month, the last date set for hearing being the 13th day of February, 1922; that no hearing was held, and no disposition of said Matter was made on the said 13th day of February, 1922, and no action of any kind has been taken by said District Court on said petition and final account, or on any other matter in the estate of Washington Pocatello, deceased, from that day until this; that the District Court of the First Judicial District of Utah, in and for Box Elder County, disregarding the Courts most solemn judicial obligation, has during all of the years denied to these Appellants, the heirs of the estate of Washington Pocatello, deceased, the protection of the Probate Code of the State of Utah, by failing, refusing and neglecting to hold any hearing, of any kind or manner whatsoever in said estate, and said Court permitted the said Albert I. Grover to the same as steal the land inherited by these Appellants, and the said Court permitted the Administrator, Charles E. Foxley, that the District Court of said County had recommended to those ignorant Indians, as a proper person to represent them to steal the $995.00 that the said Grover had paid for their Father's deed. The record abso-

lutely showing that the heirs, the Appellants, never received one cent of their inheritance. Then when the heirs come into the same Court to ascertain what become of their inheritance, the same Court cold-bloodedly tell those heirs—and it is immaterial whether they are Indians or White persons—that the Court does not recognize the sworn report of its own officer, the Administrator in the estate, that only $1,000.00 was paid for the deed of their father and mother, and that for the reason that the deed was filed of record showing a consideration of $3,200.00 that the Court was going to assume that the full amount was paid to the escrow holder by U. F. Diteman or someone for him, and it is immaterial who got the money and by virtue of the doctrine—so the Court calls it—the Court is going to adopt the fiction of relation back of the deed to the date it was executed, so as to make a title for the present owners of the rightful inheritance of those Indians, and, further, for the reason that an Administrator was appointed—although the Court never took any action on his reports and the estate was never closed—that the statute of limitations had run against them.

Respondents can try to cover up the real facts by all the camouflage and smoke screens that it is possible to invent, but the record shows the cold facts to be, that the white persons took every cent of the Appellant's inheritance, and the Courts of Utah aided and permitted the said white persons to do that very thing.

The Supreme Court of the State of Utah refused to take judicial notice of the probate file and proceedings in the District Court in the estate of Washington Po-

catello, deceased, and strikes the Bill of Exceptions on Respondent's motion, and for that reason refuses to consider the facts in the case, and approves the fiction of relation back of the deed, so as to cut the heirs out of their rightful inheritance, by holding that the account and report of the Administrator might not tell all the truth. Referring to the final account of the Administrator the Supreme Court said:

> "With this contention we cannot agree. The report of the Administrator was never heard or passed upon by the Probate Court. We cannot say that it necessarily spoke the truth with respect to the amount received by the Administrator from the bank, nor the report established that the bank delivered to him the total of the amount paid by the grantee for the deed, especially since the stricken bill may contain evidence which precludes any inference which might possibly be drawn therefrom."

That sworn account of the Administrator was certainly strong prima facie evidence, it being sworn to and a record of the Court in this case, its truth must stand until it was proven by competent evidence to be false or wrong. Probate proceedings are indivisable, and all matters pertaining to an estate are a part of the probate proceedings from the appointment of the Administrator until the estate is closed and the Administrator is discharged.

The Supreme Court of California, whose laws are similar to the State of Utah, that is all probate proceedings are through the Superior Court in California,

and are conducted through the District Court in the State of Utah, and the California Court has recently held as follows:

> "The administration of an estate is one indivisable judicial proceeding from the order appointing the Administrator till his discharge." Food v. Roach 126 Cal. App. 631, 14 Pac. 2nd, 170. While sitting in probate, the superior Court may determine the validity of a contract whereby it is claimed a spouse has been divested of all interest in the estate. Estate of Cover, 188 Cal. 133, 204 Pac. 583; Estate of Warner 6 Cal. App. 361, 92 Pac. 191. The fact that it is acting in probate when called upon to apply rules in equity or principles of law to decide a question requiring settlement, does not affect its jurisdiction to do so. As a probate Court in determining issues arising in the administration of an estate, "It may bring to its aid the full equitable and legal powers with which, as the Superior Court, it is vested." Estate of Bell, 168 Cal. 253, 141 P. 1179-80. When the Superior Court has jurisdiction of the subject-matter of a case, falling within either equity or law, it has power to hear and determine, in the mode provided by law, all questions of law and fact, the determination of which is ancilliary to a proper judgment."
>
> In re Dobins Estate, Dobins v. Title Guarantee & Trust Co. et al. 97 Pac. 2nd, 1051, 1055.

Appellants father had no other Court to go to for the purpose of decreeing his inheritance, but the District

Court of Box Elder County, Utah. The Supreme Court of Utah has recently held:

> "Federal Courts have no jurisdiction in probate matters in respect to the administration of the estate of deceased persons."
>
> Zion Sav. Bank & Trust Co. v. Harris (Utah) 105 Pac. 2nd, 461, 472. (decided Sept. 13, 1940).

In a probate matter, a non-resident of the State of Utah can appeal to the Supreme Court of the United States if he rightfully contends and can show that his inheritance was completely taken away from him in the courts of Utah, and he was denied the protection of the Probate Code of Utah. In the case at Bar, the action to quiet title could have been brought in the Federal Court, but no accounting could be had in the Federal Court, and besides the whole matter of the estate of Washington Pocatello, deceased, was in the State Court of Utah since the State Court appointed the Administrator.

Respondents on page 9 of their statement, make the astounding argument as follows:

> "Furthermore, the application of the doctrine of relation back does result in a "furtherance of justice".

That is an astounding statement in the face of the record that shows the heirs were robbed of every cent of their inheritance; and then respondents go on and say:

> "Foxley v. Rich et al., 35 Utah 162; 99 Pac. 666,

cited by Appellants is a case in which rights of third parties had intervened."

That is immaterial whether third party rights have intervened or not, what right of a third party could be more solemn or sacred than the inheritance right of heirs. The most astounding expression of Respondents is when on the same page they say:

"Here the heirs gave no value for the land, so are not intervening parties. Indeed, they would be unjustly enriched if they were allowed to retain land which had been sold by their ancestor, for they would inherit both the land and the purchase price. (which the Court found had been paid)."

How Respondents can make such a statement in the face of the record that shows that the heirs did not even receive a cent of the $1000.00 that was paid into the Bank for the deed, as found by the Court, which findings were prepared by counsel for Respondents and in part are as follows:

"That in the summer of 1921 Superintendent Donner called Minnie Pocatello and her daughters, Plaintiffs herein, in his office and advised them that Charles E. Foxley reported he had about $995.00 belonging to the estate of Washington Pocatello, and that after deducting attorney's fee and cost there was left about $490.00 for the heirs, the exact manner of acquiring said money being not explained to said parties." (Finding No. 18).

Now the record shows and it is admitted by all part-

ies that the District Court of Box Elder County never heard the petition and account of the Administrator Charles E. Foxley, no order of settlement of the account, and distribution was ever made, that the Court refused and neglected to settle the estate, but permitted Charles E. Foxley to take the full amount of the $995.00 he reported he received from the First National Bank of Pocatello to himself, and the transcript of the testimony shows the heirs never received one cent of their inheritance. It should be very noticeable that Respondents throughout their statement never attempt to say that it was proved that the full amount was paid for this deed, they rely on the fact that the lower court presumed and thereby found that the full amount had been paid, and because the lower court so found, and the Supreme Court of the State of Utah, struck the Bill of Exceptions, that the finding of the lower court cannot be disturbed.

Fourth: The case at Bar is an action to quiet title, and is an equity case. The Respondents came in and pleaded affirmative relief, that the court quiet title to the undivided one-third interest in Respondents. The findings of the lower Court prove, that the lower Court found and adopted the fiction of relation back, on the ground that the deed was filed of record and on its face it showed a consideration of $3200.00, and for that reason despite the account of the Administrator the lower Court arbitrarily held that the full amount had been paid by some one to some one, and on such presumption, the lower court determined to make a deed for the Respondents, and thereby deprive Appellants of their inheritance; that the Supreme Court

of Utah, the highest Court in the State, struck the Bill of Exceptions, refused to review the testimony in the case, refused to take judicial notice of the account of the Administrator in the estate of Washington Pocatello, deceased on the ground that the report might not tell the truth, and affirmed the adoption by the lower Court of the fiction of relation back in this case; that Appellants allege that thereby the Supreme Court of the State of Utah, denied to those Appellants the equal protection of the laws of the State of Utah, and denied to Appellants the protection of the laws of the United States, and pronounced the final word in the State of Utah taking from the Appellants, Indians, non-residents of the State of Utah, a valuable inheritance for which Appellants had not received one cent, and gave it to White persons, residents of the State of Utah. Contrary to the laws of Utah, and contrary to many of the previous decisions of the Supreme Court of Utah, and in support of this assertion we quote the following authority:

Section 104-41-1 Revised Statutes of Utah, 1933, Provides:

"From all final judgments of the district Courts, except in certain cases specially provided for originating in city courts and in justice's Courts, there shall be a right of appeal to the Supreme Court. The appeal shall be upon the record made in the district Court. **In equity cases the appeal may be on questions of law and fact;** in cases at law the appeal shall be on questions of law alone. Appeals shall also lie from the final orders and decrees of the court in the administration of dece-

dents estates and in case of guardianshij'

In the case at bar, the appeal was taken on uestions of law and fact and from the whole thereof.

The Supreme Court of the State of Utah, n other cases has repeatedly held that in equity cases ne Supreme Court must pass on questions of fact aswell as law, and must review the record of the tri: of the case to determine whether the facts sustain ne findings and judgment, the following are only son: of the decisions on that point in a very recent case ne Supreme Court of Utah said:

> "This being an equity case we are reuired to examine the evidence and determine te facts for ourselves. It has sometimes been stted the review of an equity case under our contitution and laws is a trial de novo upon the reord. In equity cases the review in this Court "in:ffect is a trial de novo on the record," Jensen vHowell, 75 Utah 64, 282, P. 1034, 1038. "In an eqity case, this court is authorized to review both uestions of law and of fact." Independent Oil andGas Co. v. Shelton et al., 79 Utah. 384, 6 P. 2d, 102, 1032."
>
> Federal Land Bank of Berkeley, v. Slt Lake Valley Sand & Gravel Co. et al., 85. Pac2d, 791.

The case just above quoted from was decidd by the Supreme Court of Utah, on the 3rd day of anuary, 1939, and in that decision they quote the cas of Jensen vs. Howell, where the Court held it wa a trial de novo on the record in the case. In the cae at bar

the entire record in the lower court, was brought before the Supreme Court by a bill of exceptions that was allowed and settled by the lower court, and the Supreme Court strikes that bill of exceptions on Respondent's motion, and refuses to apply to these Appellants the same rule of law that the Court applied in the above quoted cases.

Respondents on page 8 of their statement say:

> "Appellants, second reason why the burden should have been placed on Respondents is that this is an equity action in which questions of both law and fact are reviewed. This involves no Federal question, furthermore, it is an unsound contention for even in equity action the burden is always on Defendant."

In the case at bar, the record will show that the Appellant sustained the burden of proof in the lower Court, and proved that the deed was the same as stolen, and that Appellants never received a cent of their inheritance, and besides the burden of proof in this case is a Federal Question. First: under Section 194, U. S. C. A. the Act of Congress, passed for the protection of Indians; that protection follows the Indians as heretofore set forth clear to the Supreme Court of the United States. Second: by striking the bill of exceptions and refusing to examine the record, the Supreme Court of Utah has discriminated against the Appellants, and denied to the Appellants the equal protection of the laws of Utah. Appellants humbly ask this Honorable Court this question: Can the Supreme Court write the above cited decision on the 3rd of

January, 1939, stating that the Supreme Court in all equity cases "are required to examine the evidence and determine the facts for ourselves; and that equity cases in fact is a trial de novo on the record", and then in the case at bar on July 17th, 1940, strike Appellant's bill of exceptions on the motion of Respondent and refuse to consider the evidence in the case; is that not a discrimination in favor of residents of Utah against non-residents of Utah?

Respondents cite to this Court the case of Hardgraves v. Burton, Appellants respectfully calls the Court's attention to that case, and we quote what the Supreme Court of Utah said:

> "But as said in the beginning, this is a case in equity in which we are required to determine the facts as well as law, and in which we are not bound by the Finding of the trial Court, if, in our opinion they are clearly against the weight of the evidence."
>
> Hardgraves v. Burton, 39 Utah, 575, 585; 206 Pac. 262.

In all the previous equity cases brought before the Supreme Court of Utah, the Court has held that they are bound and required to examine and consider the evidence taken in the case, but in this case they strike the bill of exceptions and say they cannot consider the facts, and say they are bound by the findings of the lower court.

The case of Escamilla vs. Pingree, cited by Respon-

dents, supports Appellant's contention that the Supreme Court was discriminating against the Appellants when the Court dismissed the bill of exceptions, as the Court said in that case:

> "The case is purely equitable, and the mere fact that a jury was called to pass on the facts in no way affects the character of the case. Nor did that fact in any way affect the province or duties of the trial Court. Nor can it affect those of this court relative to equity cases.
>
> Escamilla v. Pingree, 44 Ut. 421, 427; 141 Pac. 103.

Appellants allege that the case of Tatsuono v. Kasai 70 Utah, 203, 259 Pac. 318, if at all in point in this case, supports Appellant's contention much more strongly than it supports Respondent's contention. The Court first said:

> "That Appellants have burden of showing the judgment is eroneous."

In the case at bar, the Appellants contend that they have overwhelmingly shown to the Supreme Court that judgment of the lower Court was erroneous, also in that case the Court said:

> "While the findings by assignment are challenged as not being supported by the evidence or as being against the greater weight of the evidence, yet little is said concerning such matters and nothing of substance pointed out and our attention called there to which requires contrary

findings or a modification of the findings by this Court."

Appellants further call this Court's attention to the fact that the above quoted case by the Respondents involved property that was wrongfully taken from Respondent, and the lower Court had returned Respondent his property and the other party appealed.

Respondent on the same page of their statement alleges as follows:

> "The Probate proceedings which Appellant claimed is entitled to judicial notice is no more a judicial proceeding than the present case."

Appellants do not understand what Respondents mean by that assertion. The case at bar is an action to quiet title and for an accounting of the rents and profits of property that was decreed to the estate of Washington Pocatello, deceased. A Special Administrator was appointed by the Court, in the estate of Washington Pocatello, deceased, to join with the heirs and the Court is bound to take judicial notice of all the records in the case. It is very evident from the Court's findings of fact that the Trial Court did take judicial notice and construed the probate proceedings in the Washington Pocatello estate, to the benefit of the Respondents when the Court found as follows, in Finding 15:

> "That on December the 3rd, Charles E. Foxley filed in the probate division of this Court a Petition for letters of Administration on the estate of

Washington Pocatello, deceased, which said Petition was supported by the Petition and Request of the heirs of Washington Pocatello, deceased, and after due and legal proceedings, had the said Charles E. Foxley was regularly appointed Administrator of said Estate and Letters of Administration were, on the 12th day of January, 1920, issued out of this Court to the said Charles E. Foxley on said estate; that the said Charles E. Foxley as Administrator and as the legally appointed representative of the heirs of said estate failed to take any legal steps to recover the alleged one-third interest in said eighty acres of land from A. I. Grover, although the Court finds that the said Charles E. Foxley was appointed at the request of the heirs of Washington Pocatello and said heirs at all times knew that the said Charles E. Foxley, as such administrator, represented them and the said estate of Washington Pocatello; the Court finds that there is no proof that Charles E. Foxley as Administrator of said estate or otherwise connived and conspired with A. I. Grover, and the Court therefore finds that the said A. I. Grover did not fraudulently connive and conspire with the said Charles E. Foxley, Administrator of said estate, or otherwise, and that "said Charles E. Foxley did not improperly accept from the First National Bank of Pocatello, Idaho, any money with intent to cheat and defraud the heirs of Washington Pocatello, deceased; that said Charles E. Foxley did not connive and conspire with A. I. Grover to file a copy of Letters of Administration

with the First National Bank of Pocatello, Idaho, for the purpose of obtaining the said deed of Washington Pocatello and Minnie Pocatello, his wife, covering said property; that there was no evidence offered to the Court as to the whereabouts of Charles E. Foxley and the Court finds that the proceedings in the Estate of Washington Pocatello **were regular insofar as administered** and that from January 12th, 1920, the date of appointment of the said Charles E. Foxley, to the date of the filing of complaint herein, the said Charles E. Foxley was the duly appointed, qualified and acting administrator of said Washington Pocatello, deceased, and represented the said estate and the heirs of said estate." (Finding 15. Trans. 0319, 0320).

Appellants allege that the foregoing finding made by the trial Court is so contrary to and directly opposite to the evidence produced in the case, that it shows that the Court was determined to make a title for the Respondents. Said finding charges that the heirs are the ones that are to blame because the said Court itself did not perform its solemn obligations and perform its duty in Administering the estate of Washington Pocatello, deceased.

IN CONCLUSION: Appellants respectively allege that the record in this case striped of all verbiage, shows conclusively that Appellants and their ancestors were full-blooded Indians, wards of the Government, non-residents of the State of Utah, that they

were brought into the District Court of Box Elder County, Utah, by artful and designing White persons, for one purpose only, that is to obtain from them, without any just consideration for the same, their valuable inheritance. And the record further shows that the District Court of Box Elder County, Utah, assumed, and acquired jurisdiction over their rights and inheritance, and performed its duties just long enough to permit the artful and designing White persons, residents of the State of Utah, to rob them of every cent of that inheritance, and as soon as the entire inheritance was snugly in the hands of the Citizens and residents of Utah, then the Court for over 17 years refused and neglected to apply to or give those Appellants the benefit of or the protection of the Probate Laws of the State of Utah, or to give Appellants any protection, that record in said District Court is so clear and plain that he who runs may read, and now, when the Appellants did come into said Court to try and ascertain what became of their inheritance and to reclaim the same, they are told by that Court they have no standing in that Court, that they are barred by the statute of limitations, that the Court appointed an Administrator over their estate and they knew it. And the Court arbitrarily makes a title for the White persons, citizens and residents of its own state.

If that is not a violation of the Fourteenth Amendment of the Constitution of the United States, and denying these Appellants the equal protection of the laws, and taking their property and inheritance away from them in violation of the Fourteenth Amendment

of the Constitution of the United States, that gives this Honorable Court jurisdiction to examine the whole record and determine whether Appellant's charges are true or not, then Appellants fail to see what would be necessary to give this Court jurisdiction, and Appellants will have to forget they ever were given an inheritance in the State of Utah.

Respectfully submitted,

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